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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 484

MILLARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. LEVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ and EMANUEL M. BURGIN,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, MILLARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. LEVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ and EMANUEL M. BURGIN, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on July 10, 1946 (2397),[1] rehearings denied August 12, 1946 (2440).

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1 All numerical references, unless otherwise stated, are to pages of the printed record.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and under Sections 687, 688, Title 18, U. S. C., Section 723(a), Title 28, U. S. C., and the Rules of Criminal Procedure adopted thereunder, particularly Rule 37(b).

The Circuit Court of Appeals affirmed the judgments of conviction of the petitioners on July 10, 1946 (2397).

This petition is filed within thirty days from the date of the denial of the petitions for rehearing (Rule 37(b) of the Rules of Criminal Procedure).

Opinions Below

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (Hutcheson, Waller and Lee, Circuit Judges) has not yet been officially reported and is printed at pages 2397 to 2410 of the Record. Denial of rehearing was without opinion (2440).

Statement of the Matter Involved

The judgment of the United States Circuit Court of Appeals sought to be reviewed affirmed judgments convicting the petitioners on March 10, 1944, in the United States District Court for the Eastern District of Louisiana for the violation of 15 U. S. C. 77(q) (Securities and Exchange Act) (Counts 1 and 2) and also for violation of 18 U. S. C. 338 (Mail Fraud Act) (Counts 4 and 5) (2-36).

The Court sentenced all of the petitioners to long terms of imprisonment.[2]

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2 Petitioners Baker and Diaz were each sentenced to a term of imprisonment of five years on Count 4 and one year on Count 5, to run consecutively, and to five years on Counts 1 and 2, to run concurrently with the sentence under Count 4—a total of six years each (171-2, 182-3). Petitioners Safir, Bird, Kahn

Tried together with petitioners upon the same indictment, likewise convicted and sentenced to long terms of imprisonment were Nathan Silverman and Rubein V. Johnson, both of whom are filing individual applications for certiorari.

Additional defendants, not tried, were Manzello who died, and Kiefer who was in the Army, at the time of trial. Overgaard was named as a confederate but was not indicted because he had died (2).

This judgment is the result of a series of errors of the first magnitude. The trial court's basic instructions to the jury features not merely a single misdirection concerning "the substance of the standard by which guilt is determined in our courts" (*Bollenbach* v. *United States,* 327 U. S. , 90 Law Ed. 318), but a repeated number of like errors which should not be permitted to stand. Intensifying the errors dealing with the general standards relating to the petitioners' guilt were a number of major prejudicial errors in the charge dealing with propositions of pertinent statutory and common law, as applied to the facts of this case. The cumulative prejudicial effect of all this is of overwhelming proportions. In addition, the Circuit Court opinion sustaining the convictions is directly in conflict with controlling authority on several scores, and against the weight of authority on others.

In direct conflict with the holding of this Court in *Coffin* v. *United States,* 156 U. S. 432, 456-461, the trial court charged that the presumption of innocence is "no evidence at all" (1703), and lest there be any doubt in the jury's

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and Levy were each sentenced to serve a term of four years on Count 4 and one year and one day on Count 5, to run consecutively to the term imposed on Count 4, and five years on Count 1 and Count 2, to run concurrently with the terms imposed under Counts 4 and 5—a total of five years and one day (176-7, 179-180, 180-1, 182-3). Petitioner Burgin was sentenced to a total of 7 years.

mind as to the sweep and significance of this statement, the Court made it explicit that "this presumption of innocence will avail the defendants no further, so soon as *prima facie* evidence of the truth of the charges laid against them in the indictment is presented to the jury * * *" and the presumption "plays its part only so long as there is no legal evidence as to the particular fact to be established" (1703).

The Court further emasculated the presumption of innocence by improperly charging that the presumption of innocence was not intended "as extending aid to one who in fact is guilty" (1703). It was apparent that the Court completely misapprehended the essential significance of this presumption which the Fifth Circuit said in another case applies to all—guilty or innocent. The holding in this case is directly contrary to the decision of the same Circuit in *Gomila* v. *United States,* 146 Fed. (2d) 372, 373, on the same subject where the same trial court was reversed and the conviction set aside because this self-same charge had been made. It is significant to note that reversal followed in the *Gomila* case even though no exception appeared in the record.

Adding to the foregoing basic errors was the Court's charge in this case, where no defendant took the witness stand and where the jury considered it a close case, as evidenced by deliberation of more than six hours, that *prima facie* evidence of the facts alleged in the indictment "brushes aside the presumption of innocence" and is sufficient when it "is not met by the defendants opposing satisfactory evidence" (1703). The charge continued to say that the jury, in judging the credibility of witnesses, of whom there were none but government witnesses, "will bear in mind that, under the law, every witness is presumed to intend to speak the truth" (1704). The damage caused by

the latter artificial presumption must be viewed in the setting of the whole case in which almost all of the government witnesses who bought land from or through any of the defendants and petitioners had repented of their bargain and many of them had been compelled to grudgingly concede that in dealing with particular petitioners or defendants, these government witnesses themselves believed that they were conspiring with these defendants to take advantage of breaches of trust.

Thus, with the presumption of innocence rendered inoperative, and the defendants called upon to produce "satisfactory evidence", this artificial presumption became crucial. There was nothing left for the jury to consider except the testimony of the government witnesses. The Court in its charge further removed all possible doubt of the ultimate result when it said that its submission of the case to the jury meant that there was substantial evidence under each count so submitted (1705). The petitioners were thus deprived of a fair trial on any factual question, a verdict of guilt was directed against them in no uncertain language, and the only thing that might have been a factor to be considered by the jury—the presumption of innocence—was forcibly taken from them. Under these circumstances, a review of this conviction is required.

Although the indictment charged, as the statute required it to charge, that the defendants placed or caused to be placed certain matter in the mails in furtherance of an alleged scheme to defraud, the trial court took this issue from the jury by charging that under the facts of this case they need not find, in order to determine guilt, that the defendants did so place or cause to be placed the matter in question in the mails (1714). Thus, again, conviction was assured because the basic issue in the case—the mailing or causing to be mailed by the defendants of matter in furtherance of the scheme—was taken from the jury's con-

sideration. Hence, the petitioners have been convicted under a charge which was directly contrary to the established weight of authority. (See *United States* v. *Cohen*, 145 Fed. (2d) 182, 190, cert. denied, 323 U. S. 793; *Freeman* v. *United States*, 20 Fed. (2d) 748, 750).

It is significant to note that the only counts charged in the indictment and the only counts on which the petitioners were convicted were so-called mailing counts. The scheme to defraud was not charged independently as a conspiracy but was alleged directly in the first count and by reference in the others.

The proof offered at the trial failed to support the verdict. By that, we do not mean that it was against the weight of evidence, but rather that all the evidence did not measure up to the standard required for the submission of any count to the jury.

As to Count 5, the proof showed that the mailing, if it occurred, could not be in furtherance of the so-called scheme to defraud, because it was the return to the grantee of a recorded deed by the recording officer. This was not even alleged as part of the scheme.

As to Count 4, the proof showed that the alleged use of the mails was not in furtherance of the alleged scheme to defraud and that the actions of the petitioners could not be interpreted as furthering this scheme. Since this mailing involved the transmission of a check for collection by a bank in which the check was deposited after the transaction allegedly fraudulent was completed, the decision of the Circuit Court sustaining the conviction under this count is directly contrary to the holding of this Court in *Kann* v. *United States*, 323 U. S. 88.

As to Counts 1 and 2, it suffices to say that nothing was offered to connect these mailings, if indeed they were such, with the scheme.

Contrary to this Court's holding (*Ross* v. *United States*, 92 U. S. 291), and indeed, contrary to uniform authority, the Circuit Court sustained the conviction under the mailing counts on the theory that inferences could be drawn from inferences.

Even though the trial court submitted the case to the jury as a single scheme, the Circuit Court seemed to have some doubt on the subject (2408). It, however, brushed aside the claim of variance upon the authority of *Berger* v. *United States*, 295 U. S. 78. The Circuit Court did refer to *Kotteakos* v. *United States*, U. S. , 89 Law Ed. 1178, but stated that it did not apply to the facts herein. With the latter view, we respectfully disagree, and earnestly contend that the proof in this case showed that at least eight, if not more, separate and independent schemes existed. This we will establish in our discussion of the evidence in the brief accompanying the petition.

On this subject, however, it is essential to see that even if a general scheme existed, there was substantial evidence on the basis of which a jury, free to consider the subject, might have, and we believe would have, decided that the transactions connecting the petitioners under Counts 1, 2, 4 and 5 (for different reasons in each count) were not part of the general scheme and that petitioners' connection therewith was not fraudulent. The jury, however, were not so free to find because the Court emphatically submitted the case and all the evidence on the theory of one scheme, and only one scheme, and upon the further theory that guilt of one is guilt of all (1209-10, 1702, 1706, 1708, 1710). That the jury followed the Court's erroneous charge and were misled by this theory is an unrebuttable presumption of law.

Questions Presented

1. Did the Circuit Court err in sustaining these convictions despite the cumulative effect of the following prejudicial errors in the basic instructions to the jury? [3]

(a) "But this presumption of innocence will avail the defendants no further, *so soon as prima facie evidence of the truth* of the charges laid against them in the indictment is presented to the jury. That prima facie evidence, if it satisfies the jury, beyond a reasonable doubt, of the guilt of the defendants bars the presumption of innocence, because the presumption is *no evidence at all, and plays its part only so long as there is absence of legal evidence* as to the particular fact to be established. If such prima facie evidence, which so brushes aside the presumption of innocence when found worthy of belief by the jury, *is not met by the defendants' opposing satisfactory evidence, then that simple prima facie evidence,* if it convinces you gentlemen of the jury, as the final judges of the fact, that guilt has been proved, beyond a reasonable doubt, would justify you in rendering a verdict of guilty as charged" (1703-4, Emphasis supplied).

(b) "But, as forceful as that rule [presumption of innocence] is in the protection of one who stands charged with crime, it must not be forgotten that it *is not intended, nor has it ever been intended, as extending aid to one who in fact is guilty,* so that he or she may escape just punishment" (1703, Emphasis supplied).

(c) That in considering the credibility of the testimony, the jury should "bear in mind that, under the law, every witness is presumed to intend to speak the truth" (1704).

(d) The Court's emphatic refusal to charge, upon request, that the failure of the defendants to testify

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3 The prejudicial effect of these errors was magnified because not one of the petitioners or defendants testified at the trial. The case was a very close one and required jury deliberation of more than six hours.

in their own behalf should not be held against them (1725-6), coupled with the belated giving of this charge after six hours of deliberation and shortly before the verdict, at which time it was improperly given as to certain of the petitioners (1736-9).

2. Did the Circuit Court err in sustaining the convictions under the Counts of this indictment (mailing counts) in which it was alleged in each count that defendants placed or caused to be placed certain matter in the mails, where the trial court had directly and unequivocally charged the jury that it was not necessary for them to find that any defendant placed or caused to be placed the alleged material in the mails in order to be found guilty of these very counts (1714)?

3. Did the Circuit Court err in sustaining the convictions under the Securities and Exchange Act (Counts 1 and 2) in (a) declining to make a finding as to whether or not the cash deeds referred to in these counts were "securities" under the provisions and purview of the Securities and Exchange Act; (b) where there was no evidence showing that the mailings actually occurred; (c) where there was no evidence showing that what was said to have been transported by the mails was actually used in connection with the defrauding of any person or in furtherance of the alleged scheme to defraud; (d) where the indictment and the proof failed to disclose what was contained in the alleged mailings and where the matter was simply described as "deeds"; and (e) where the only proof of mailing within the jurisdictional limit of the Court was attempted to be proved by piling inference upon inference?

4. Did the Circuit Court err in sustaining petitioners' convictions under Count 4, (a) where the proof disclosed that the transaction involved in this count, so far as peti-

tioners' actions were concerned, was not in furtherance of any scheme to defraud; (b) where, under the Court's instructions, the jury was not at liberty to determine whether the acts proved under this count were not in furtherance of the general scheme (1209-10, 1701-2, 1706, 1708, and 1710); and (c) where the only mailing involved was the transmission, for payment, by a New Orleans bank of a check deposited for collection by petitioner Diaz, to the bank upon which it was drawn in Pensacola, Florida.

5. Did the Circuit Court err in sustaining the conviction under Count 5, where (a) the proof was vague and indefinite; (b) where the matter allegedly mailed was a deed sent to a grantee by the recording officer after it had been recorded; (c) where the alleged mailing was not described as being part of the scheme to defraud set forth in the indictment; and (d) where such mailing was not in furtherance of the scheme to defraud?

6. Did the Circuit Court err in sustaining the convictions under an indictment charging a single comprehensive scheme or conspiracy, when the proof tended to indicate that there existed more than eight separate and distinct conspiracies?

Reasons for Allowance of the Writ

1. The decision of the Circuit Court sustains convictions under a charge to the jury which denied due process of law to the petitioners, or at least constituted such fundamental error that it must not be permitted to stand.

2. The doctrine of presumption of innocence enunciated in the trial court's instructions is in direct conflict with

Coffin v. *United States*, 156 U. S. 432, 456-461; *Cochran* v. *United States*, 157 U. S. 286; *Kirby* v. *United States*, 174 U. S. 47, 55.

3. The first refusal of the trial court to give a properly requested charge on the effect of the failure of the defendants to testify in their own behalf was directly contrary to this Court's holding in *Bruno* v. *United States*, 308 U. S. 287. The belated effort to correct this error still failed to give effect to this Court's holding in the *Bruno* case.

4. The trial court's charge that defendants may be guilty of mailing counts without themselves mailing or causing the mailing of the material in question, confuses an important proposition of federal criminal law, and is in conflict with the holding of the Second Circuit in *United States* v. *Cohen, et al.*, 145 Fed. (2d) 182, 190, cert. denied, 323 U. S. 793; and the Third Circuit in *Freeman* v. *United States*, 20 Fed. (2d) 748, 750.

5. The decision of the Circuit Court is untenable and in conflict with the decisions of this Court and uniform authority when it sustains a conviction of using the mails to defraud where the only proof of mailing depends upon drawing inferences from inferences. *Ross* v. *United States*, 92 U. S. 281; *Brady* v. *United States*, 24 Fed. (2d) 399, 403; *Davis* v. *United States*, 63 Fed. (2d) 545, 546; *Freeman* v. *United States*, 20 Fed. (2d) 748, 750.

6. The refusal of the Circuit Court to determine whether "cash deeds" under the proof of this case are "securities" under the Securities and Exchange Act (2399) deprives petitioners of an intermediate decision on a most novel and important question of criminal law. It was the duty of the Circuit Court to decide this question. The question itself

is important and ought to be decided by this Court, or, in the alternative, should be remanded to the Circuit Court with instructions to decide it. *Gerdes* v. *Lustgarten,* 266 U. S. 321, 327; *Lutcher & M. Lumber Company* v. *Knight,* 217 U. S. 257, 268.

7. The decision of the Circuit Court sustains convictions under a charge which rendered petitioners liable for the acts of others when such acts were not within the scope of general conspiracy allegedly proved.

8. The decision of the Circuit Court appears to conflict with *Kotteakos, et al.* v. *United States,* U. S. , 90 Law Ed. 1178.

9. The rejection by the Circuit Court of Appeals (without discussion) of the claim that the alleged mailings under Counts 4 and 5 were not a part of the execution of the scheme to defraud is in conflict with the decision of this Court in *Kann* v. *United States,* 323 U. S. 88.

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the case numbered 10,984 and entitled in its docket as "Millard C. Baker, Nathan Silverman, Isadore Walter Kahn, Benjamin L. Levy, A. M. Safir, William B. Bird, Rubein Johnson, Emanuel M. Burgin and Gabriel Diaz, Appellants, versus United States of America, Appellee," and that the judgment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated, September 9th, 1946.

MILLARD C. BAKER
ISADORE WALTER KAHN
BENJAMIN L. LEVY
A. M. SAFIR
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SAMUEL A. TENNANT,
all of New Orleans, Louisiana,
With him on the Petition.

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay. Dated, September 9th, 1946.

HENRY G. SINGER
Attorney for Petitioners
and a
Member of the Bar of this Court
16 Court Street
Brooklyn 2, New York

IN THE

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OCTOBER TERM, 1946

No.

LARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. EVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ nd EMANUEL M. BURGIN,

Petitioners,

—against—

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Statutes Involved

Federal Statutes involved are Title 15 U. S. Code, n 77(b and q), (Securities and Exchange Act), and 18, U. S. Code, Section 338 (Mail Fraud Statute).

Statement of Facts

The Indictment

indictment contains seven counts. Counts 1, 2 and rge Securities and Exchange Act violations. Count 1 bes a scheme to defraud allegedly adopted by defen- and then states that "the defendants * * * did know- * * * in the sale of a security, to wit, a cash deed employ said scheme and artifice by use of the United

States mails * * *" (19). The mailing is identified as a letter "that the defendants, on or about March 10, 1941, placed or caused to be placed in the United States Post Office at New Orleans, Louisiana, * * *", written by petitioner Baker to the Deposit Guaranty Bank at Jackson, Mississippi. The letter refers to an enclosure of a deed executed by the Plaquemines Land Co. in favor of defendant Silverman, and directs the bank to deliver the deed to Silverman upon his paying the consideration of $112.50 plus handling charges (19-20).

Count 2 incorporates the alleged scheme to defraud described in Count 1, by reference, and again alleges that in the "sale of a security, to wit, a cash deed" by use of the United States mails, the defendants employed said scheme (20). The mailing identified in this count is another letter from petitioner Baker to the same bank referring to an enclosure of a deed executed by the land company to Silverman and directing its delivery upon receipt from Silverman of the consideration of $55. This second letter the defendants are alleged to have deposited on or about March 12, 1941, in the New Orleans Post Office (21).

Counts 4, 5, 6 and 7 are Mail Fraud counts.

Count 4 again refers to Count 1 for a description of the scheme to defraud, and proceeds to allege that "for the purpose of executing same * * * on or about July 27, 1940", the defendants did "place or caused to be placed" in the New Orleans post office, "a certain check enclosed in a postpaid envelope addressed to the Citizens Bank, Pensacola, Florida" (28). The check was made by Mrs. M. E. Fowler, payable to petitioner Diaz in the sum of $1395, and was endorsed on the reverse side,

"Gabriel Diaz
Pay to the order of Any Bank, Banker, or Trust Co.

All prior endorsements guaranteed. June 27, 1940. American Bank & Trust Co. 14-80 New Orleans La. 14-60" (29).

Count 5 again refers to Count 1, for a description of the scheme to defraud, and goes on to state that "for the purpose of executing same, * * * on or about April 15, 1941," the defendants placed or caused to be placed in the Post Office at Pointe-a-la-Hache, Louisiana, a certain cash deed, enclosed in a postpaid envelope, addressed to Miss Lorena Duling, in Jackson, Mississippi (29-33).[1]

Counts 6 and 7 were dismissed upon motion of the Government (1678). The Court directed a verdict on Count 3 (1685).

The Evidence

In order to properly evaluate testimony which can be specifically allocated to Counts 1, 2, 4 and 5, it will be necessary to discuss the general pattern of the evidence.

At the outset, we press the contention that all of this general testimony should not have been admitted as against all the defendants under the "one scheme theory" and that it was error to overrule the many objections raised on this subject. So, too, do we maintain that there was no relationship between the so-called general pattern of the case and the acts relating to the specific counts sufficient to form a basis for the government's claim that the act of one was the act of all. We believe that the evidence establishes, not the existence of one single comprehensive scheme, but, on the contrary, a number of unconnected dealings with many people. True, in each instance, the basic idea was to sell

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1 Comparison of the text of the cash deed as given in this count, with the description of property said to be conveyed through the cash deeds referred to in the letters in Count 1 and 2 shows that the deed in Count 5 refers to property different from that in Counts 1 and 2.

land, but the approach, the representations and the manner of sale was different. The financial interests of all of the defendants were diverse and no testimony was offered from which even an inference could be drawn of a direct or conspiratorial connection.

Many years ago, in 1911, M. C. Baker, one of the petitioners, organized a corporation for the purpose of buying and selling land. Baker owned the corporation, and no one else involved in the case had anything to do with it. He sold land to some of the petitioners and defendants, but in each instance, as the record clearly shows, they paid for the land. In the event a salesman sold land for Baker, that particular salesman received commission on that sale. (See G-400,[2] 2263, G-401b, 2265, G-401c, 2266, G-402b, 2267, G-402d, e and f, 2268).

When the investigation in this case began, Baker voluntarily surrendered his books and other documents, and it is obvious from the record that most of the evidence obtained by the government came from these voluntarily surrendered papers. The land so owned by Baker was in St. Bernard Parish and Plaquemines Parish. Sometime in 1935, and annually thereafter for several years, Baker, through his company, the Plaquemines Land Co., gave a series of leases to the Gulf Refining Company. In each instance, the lease was for five years and required the payment of annual rent, plus taxes. Thus, the land the Plaquemines Land Co. owned had prospective value as oil land and was so recognized by one of the largest oil producing companies. In addition, the land had trapping possibilities for fur-bearing animals, and the Gulf Refining Company itself made leases to fur trappers.

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2 All Government exhibits are identified by the letter "G" before the numbers.

Baker sold land to Diaz, Burgin, Kahn and Safir, and they in turn sold it to others, with Baker having no financial or other interest in the proceeds of any of these sales. Baker's only interest was to sell the land to anyone who would buy it.

Many years after Baker had organized this land company, defendant Kiefer (not tried) and defendant Silverman (tried and convicted) began to operate a brokerage office in New Orleans. They were registered under the Securities and Exchange Act and dealt in the main in oil stocks and royalties. There was no connection between the Kiefer-Silverman firm and Baker's land company, except that the officers may have known each other. Kiefer-Silverman purchased certain specifically designated parcels of land from Baker and, using a technique all of their own, sold this land to a number of persons who testified at the trial. Baker sold the land to Silverman at a specific price. Silverman sold it for anything he could get. Baker was in no way responsible for any sale by Silverman. As a matter of fact, when we discuss the evidence under Counts 1 and 2, it shall be definitely established that Baker dealt with Silverman-Kiefer at arms length, even to the extent of refusing to deliver a deed until the money had been paid into a neutral bank on sight draft.

How Bird's activities were brought into this case is hard to determine. If anything, Bird's relationship was with Silverman-Kiefer, and had nothing to do with Baker, Kahn, Diaz, Safir, Levy or Burgin. Here again, if there was any scheme to defraud, in which Bird was involved, and this we seriously doubt, it could only have existed between Kiefer, Silverman and Bird, and could in no way be traced directly or indirectly to the actions of any other petitioner or de-defendant. So, we have these eight or more independent

groups of persons,[3] all pursuing the same course, and that is of selling certain designated land. The indictment charged a single general comprehensive scheme to defraud, and hundreds of pages of testimony were admitted concerning independent acts of petitioners and defendants, just because the indictment was framed in this fashion. This indiscriminate admission of testimony went to the extent of permitting in evidence dealings of Kiefer and Silverman in 1937, dealings of Kahn in 1937 and 1938, and dealings of other defendants during the years between 1936 and 1940. This, in spite of the fact that the four specific mailing counts submitted to the jury concerned incidents which occurred on March 10 and 12, 1941 (Counts 1 and 2), June 27, 1940 (Count 4), and April 15, 1941 (Count 5).

Nevertheless, on the theory of the all-comprehensive scheme, all the testimony was lumped together, and every defendant on trial was charged with responsibility for the acts of the others. They were even charged with responsibility for the acts of defendants not tried and when they attempted to defend such acts, the Court refused to permit such defense, stating, "It does not lie in the mouth of either defendant to champion the cause of Mr. Kiefer, who is not on trial here today" (1210).

Counts 1 and 2

The indictment charged the mailings on March 10 and 12, 1941. These mailings, which we insist were not proven, consisted of two letters by Baker to a Bank at Jackson, Mississippi. The envelopes with the physical indicia of mail-

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3 (1) Baker and Diaz; (2) Baker and Kahn; (3) Baker and Safir; (4) Kahn and Levy; (5) Silverman and Kiefer; (6) Silverman, Kiefer and Bird; (7) Baker, Silverman and Kiefer; (8) Baker and Burgin; (9) Johnson, Kiefer and Silverman. Silverman in his application for Certiorari (p. 4) grouping the subject matter by land sales argues that "twenty five" schemes were proven.

ing were not offered in evidence. The place of mailing was not established. The court took it upon itself to say that because both these letters were on stationery which bore the heading of M. C. Baker, New Orleans, Louisiana, this fact alone was sufficient upon which the jury could draw the inference that the letters were mailed from New Orleans—where the Court and Grand Jury had jurisdiction (463). The officer of the bank in Jackson, Mississippi, who testified concerning these letters, based his testimony on general business custom of his bank (457). Both letters were almost identical. Each letter stated that it accompanied a deed (never offered in evidence and described only as a "cash deed") which the payment of a sight draft for a specific amount in each case. The officer of the bank did not identify Silverman as being the person to whom a deed was delivered or who paid a draft. He simply said that a deed was delivered and the draft paid. As to the second letter, the deed and the draft were returned (451, G-144A).

The attempted connection between the petitioners and this count arose from testimony to the effect that Silverman had sold certain land to a Miss Duling who lived in Jackson, Mississippi. There was no proof that the land mentioned and described in the deed from Baker to Silverman was the same land that Silverman sold to Miss Duling. In fact, Miss Duling's testimony was clearly to the effect that she had never heard of Baker, knew nothing about him or any of the other petitioners at this time, and that all of her dealings were only with Silverman and perhaps Kiefer.[4] The indictment under these two counts charged

4 We believe that the Circuit Court was inadvertently misled by the government's brief where at page 75, the United States attorney makes what we believe to be an erroneous claim that Silverman "actually sold the particular land which was contained in the deeds enclosed in the letters to Miss Lorena Duling of Jackson, Mississippi (R. 923; G-75, R. 1861-1863; G-76, R. 1864)". However, an examination of G-75 discloses that the property con-

a violation of the Securities and Exchange Act and described the two deeds as "securities" under said Act. Without the deeds in evidence, it is obvious that there was no proof that what accompanied these two letters were in fact "securities." We make this statement without waiver of our subsequent argument that "cash" deeds were not and could not have been securities within the meaning and purview of the Securities and Exchange Act. It follows therefore that guilt under Counts 1 and 2 was not established, because: (a) there was no proof of mailing, (b) there was no proof where mailing occurred, (c) the "securities" were not identified or proper secondary evidence offered, and (d) "cash" deeds are not "securities" under the Securities and Exchange Act.

Count 4

This count charged a mailing on June 27, 1940. The testimony offered to support the count came from three sources. A bank officer of the American Bank & Trust Company, at New Orleans, Louisiana, who testified that around June 27, 1940, petitioner Diaz deposited a check in the sum of $1395 for collection in his bank, made by Mrs. M. E. Fowler on the Citizens Bank, of Pensacola, Florida (28-9, 1027, G-323, 2155). This check was forwarded to the Pensacola bank for payment, and the officer of the Pensacola bank testified that the check was received and paid. Here again, the envelope with the physical indicia of the use of the mails was not offered in evidence, and proof of mailing could only be found from vague inferences

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veyed to Miss Duling was that which was acquired by the vendor (Silverman) under deed "with even date herewith" (1862). The date of the deed G-75 is April 15, 1941, while the letters which accompanied the deed and referred to in Counts 1 and 2 were dated March 10 and 12, 1941, respectively. The deeds mentioned in these letters were never offered in evidence and were never identified by any witness.

drawn from custom and usage. Mrs. Fowler, the maker of the check, was never called as a witness. Her husband did testify concerning many dealings with Diaz and other petitioners and defendants.

At this point, it becomes essential to refer to the general pattern of the case to see the damage done Diaz and the other petitioners by the admission in evidence against them of Fowler's recitals of his dealings with Silverman. Apparently, after Silverman had given Fowler a forged deed, (1213-1216, 1218-1221), Baker attempted to save Fowler from the consequences of this act. Diaz, who had long before bought some land from Baker, also met Fowler. Diaz, on his own account and not in connection with anyone else, and without the use of a single false representation, sold some land to Mrs. Fowler on account of which the check involved in Count 4 was given. After the deed had been delivered, and after the land was recorded in Fowler's name, and after the transaction was completed, Diaz deposited the check to his account in the bank in New Orleans. Certainly, a scheme to defraud Fowler, if one existed, was far beyond the completed stage at that point. The representations, if any had been made, and the article intended to be sold, had not only been sold but actually delivered. Yet, the District Court permitted the jury, nay, compelled the jury to say that the act of Diaz in depositing this check to his own credit in a New Orleans bank was the act of every defendant and petitioner in furtherance of the general scheme. All this, without the slightest indication from the record by inference or otherwise that any petitioner or other defendant had any interest, financial or otherwise, in this transaction between Diaz and the Fowlers. Thus, the proof fell far short of that required for submission to a jury, because: (a) there was no definite proof of mailing, (b) there was no connection between this mailing and any general scheme to defraud, (c) the mailing came long after

the completion of the transaction (*Kann* v. *United States*, 323 U. S. 88), (d) there was no proof that the alleged matter was mailed by the defendants or caused by them to be mailed, and (e) no false representations were made by Diaz. In fact, Fowler, at the very time of the trial, believed that Baker had been absolutely fair with him (1334).

Count 5

The mailing in Count 5 was said to have taken place on April 15, 1941. A deed was recorded in the office of the recording agent at Point-a-la-Hache, Louisiana, with Miss Duling of Jackson, Mississippi, as grantee. After recording, the deed was returned through the mails to Miss Duling (G.-74, 1861). The claim of these petitioners with respect to Count 5 transcends any question of lack of proof of mailing. First, the general scheme to defraud set forth in the indictment fails to allege that the return of a deed by a recording officer was part of the so-called scheme. Second, the transaction which resulted in the giving of this deed and its recording was one between Silverman, Kiefer and Miss Duling, in which none of the other petitioners had the slightest interest, financial or otherwise. Third, the deed itself is entirely different from any deed given to any other purchaser by any petitioner or defendant, Silverman describes himself as the grantor and the deed is executed by him and not by the land company. It cannot be overlooked that Miss Duling said that her transaction with Safir was long before and was "a fair and square sale" (936). She went on to say, further, that she had never met or had any dealings with Kahn, Levy, Bird, or the defendant Burgin (943-5). Where the defendant Johnson was concerned, Miss Duling was entirely satisfied with her dealings with him; they involved the drilling of a well in Texas, which had actually taken place (945-946).

Miss Duling's memory was very bad. In fact, she admitted that she had been in an accident long after the occurrences and before the trial, and that she had "knocked my brains out, almost * * * and there are some little things that sometimes I just don't remember" (940). It is clear that there was not sufficient evidence as a matter of law to warrant the submission of this case to the jury or to sustain the conviction once had, because: (a) the transaction involved was completely separate and apart from the general scheme set forth in the indictment, (b) the mailing itself was not within the scope of the scheme alleged in the indictment, (c) the return of the deed by the recorder could in no way tend to further a general scheme to defraud, and (d) the return of the deed was long after the transaction between Silverman and Duling had been completed, and was not an integral part of the alleged scheme to defraud.

ARGUMENT

I

The trial court deprived the defendants of a fair trial in accordance with constitutional concepts by instructing the jury, "but this presumption of innocence will avail the defendants no further, so soon as *prima facie* evidence of the truth of the charges laid against them in the indictment is presented to the jury. That *prima facie* evidence, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendants, bars the presumption of innocence, because the presumption is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established" (1703).

Coffin v. *United States,* 156 U. S. 432, 456-461;
Cochran v. *United States,* 157 U. S. 286;
Kirby v. *United States,* 174 U. S. 47, 55.

A

The trial court's admonition to the jury that the "presumption of innocence is no evidence at all" is in direct contradiction to this Court's determination in *Coffin* v. *United States,* 156 U. S. 432, 458, 461, and *Cochran* v. *United States,* 157 U. S. 286, 299, 300, a conclusion from which this Court has never receded.

The trial court's concomitant charge that " * * * this presumption will avail the defendants no further so soon as *prima facie* evidence of the truth of the charges laid against them * * * is presented to the jury * * * and plays its part only so long as there is absence of legal evidence as to the particular fact to be established", is indeed an enormity

which achieves the confiscation of defendants' constitutional rights to a fair trial. It cannot be effaced. Transcending the merely procedural, this constitutional heresay requires no objection of counsel for review by this Court (*Brasfield* v. *United States,* 272 U. S. 448, 450). The verdict of a jury reached under the auspices of such a charge, necessarily, loses its sanction, since the wellspring of the jury's judgment has been polluted.

When the trial court stated that the presumption of innocence is not evidence, it was not acting the precisionist, rejecting the word "evidence" in favor of alternative expressions such as "instrument of proof" (*Coffin* v. *United States,* 156 U. S. 432, 459; *Kirby* v. *United States,* 174 U. S. 47, 55), or "nature of evidence" (*Dodson* v. *United States,* 23 Fed. (2d) 401, 402). The narrow area of controversy that has arisen as to whether the presumption of innocence is evidence, or, more accurately, "in the nature of evidence", or an "instrument of proof", abates the gravamen of the court's prejudicial error not in the slightest.

The trial court, instead of either instructing the court that the presumption of innocence is evidence, or of substantially embodying the preposition in other language, such as "that the presumption of innocence remains with the defendant until the jury are 'satisfied of the guilt beyond a reasonable doubt' " (*Agnew* v. *United States,* 165 U. S. 36, 51, 56; see also *Coffin* v. *United States,* 156 U. S. 432, 459),[5] rejects this Court's concept of the presumption of innocence in its entirety and foists upon the jury the absurd nullificatory doctrine that the presumption of innocence plays its part only so long as there is absence of legal evidence as to the particular fact to be determined, and will

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5 The Court, in the *Coffin* case, states, "The usual formula in which this doctrine is expressed is that every man is presumed to be innocent until his guilt is proven beyond a reasonable doubt."

avail the defendants no further so soon as *prima facie* evidence of the truth of the charges laid against them, is presented to the jury.

This Court, adopting the language of Wills on Circumstantial Evidence, stated in *Coffin* v. *United States* (156 U. S. at p. 459), that the "presumption must prevail until it is destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief."

Adopting an extreme opposite view, the trial court effectively instructed the jury that as far as they were concerned, the presumption of innocence did not exist at all; that it was something that ceased to operate as soon as they began to function in the jury room. The very fact that they were given the case to consider, the jury was advised, established as law, that legal evidence had been produced which was "sufficiently substantial" (1705). This selfsame fact withdrew the presumption of innocence from their deliberations and rendered it inoperative. It could not be taken into the jury room!

B

Aggravating immeasurably the damages to defendants wrought by the trial court's exclusion of the beneficient presumption of innocence from the jury's deliberations was the ironical fact that the trial court took pains to inject a "presumption" most malignant to defendants' cause into their deliberations. In this case in which the only witnesses were government witnesses, the trial court saw fit to instruct the jury, "However, you will bear in mind that, under the law, every witness is presumed to speak the truth" (1704).

Thus, while the jury was admonished that the presumption of innocence "will avail the defendants no further so soon as *prima facie* evidence of the truth of the charges is laid against them," the presumption that every government witness intends to speak the truth was not of like evanescent character. The latter "presumption" was indeed evidentiary in nature, since the weighing of evidence, the evaluation of discrediting circumstances of bias and prejudice, was to be undertaken and pursued, under sway of the "presumption" that every government witness intends to tell the truth!

That it was grievous error, in any event, to instruct the jury that their deliberations respecting credibility and bias were to be influenced by this "presumption" that the witness is truthful, we discuss below (under III, *infra*).

At this juncture, however, we desire to emphasize (1) that the giving of the instruction that every witness is presumed to intend to speak the truth, meaning every government witness, and (2) the handicapping of the jury's right to judge credibility and bias for themselves on scales free to record their findings, by assigning ubiquitous influence to the "presumption", all this, rendered it all the more urgent that the court refrain from emasculating the presumption of innocence, and concomitantly multiplied the resultant harm, when the court did nullify the presumption of innocence.

C

The Court's instruction that the presumption of innocence was not evidence registered damage to the defendant's every time the court instructed the jury that it was the evidence that they were to consider (1704) and solely the evidence (1717). This pervasive and consequential ele-

ment of damages resulting from a charge that the presumption of innocence is not evidence is duly noted by this Court in *Coffin* v. *United States* (156 U. S. 432, 4) which stated,

> "'The proofs and the proofs only' confined them to those matters which were admitted to their consideration by the Court, and among these elements of proof, the court expressly refused to include the presumption of innocence to which the accused were entitled, and the benefit whereof both the court and the jury were bound to extend him."

D

Assuming even that a correct charge on the subject of reasonable doubt is given to the jury, the error on the subject of presumption of innocence is not abated. This Court so held emphatically and forthrightly in *Coffin* v. *United States,* 156 U. S. 432, 4), stating:

> "Concluding then, that the presumption of innocence is evidence in favor of the accused introduced by law in his behalf, let us consider what is 'reasonable doubt.' It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is a result of proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause; the other an effect. To say that one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusions upon the proof actually before them."

It can hardly be denied that the trial court's error represents a misdirection concerning "the substance of the standards by which guilt is determined in our Courts". As such it is reversible error. (*Bollenbach* v. *United States,* Vol. 90 Law Ed. 318, 327 U. S. .)

II

The trial court committed reversible error in instructing the jury that "it (the presumption of innocence) is not intended, nor has it ever been intended as extending to one who in fact is guilty, so that he or she may escape just punishment" (1703).

The best refutation of this charge comes from the opinion of the Circuit Court of Appeals of the Fifth Circuit in a prior appeal in a case in which the same language had been used by the same district judge. We refer to *Gomila* v. *United States,* 146 Fed. (2d) 372, 373.

> "The statement that the 'presumption of innocence' was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment is not a correct statement of the law. The presumption of innocence applies alike to the guilty and to the innocent, and the burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt the guilt of the accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect all persons coming before the courts charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt."

The Circuit Court, in our case, did not reject its previous holding, but refused to apply the rule of the *Gomila* case on the ground that the charge had been corrected.

The record shows clearly, that this charge was not corrected, that the purported correction, on page 1724, related only to the objection of a defendants' counsel to that part of the court's charge wherein the court indicated that

"prima facie" [6] evidence if not met by the defendants is sufficient to prove the defendants guilty. This the court attempted to correct by a charge dealing with "reasonable doubt", and including the statement, "there is no requirement under the law that any defendant offer any testimony" (1724).

It will be noted that the purported correction dealt not at all with the presumption of innocence, and corrected neither the error on that score cited under I *infra* nor the present argument (II). Indeed, the government's brief in the Circuit Court does not contend that any correction of the presumption of innocence charge was effectuated. We have already seen that a correct charge concerning reasonable doubt does not take the place of a correct charge as to presumption of innocence.

III

The trial court erred when it charged the jury that in considering the credibility of witnesses, the jury should "bear in mind that, under the law, every witness is presumed to intend to speak the truth" (1704). This was especially prejudicial since the only witnesses who testified were Government witnesses.

A

The Court "should not undertake to control the freedom of their [the jury's] judgment in dealing with the probabil-

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6 The constant and repeated use of a legal term "prima facie" without explanation or translation certainly could not assist this jury in arriving at a verdict. The words "prima facie" should be "avoided in a charge to a jury, since they are not in common use among laymen and are likely to cause confusion of thought and misunderstanding" (*McAdams* v. *United States*, 74 Fed. (2d) 37, 40).

ities of their testimony, by laying down artificial presumptions to control them in arriving at a verdict. Thus, he should not tell them that in passing on the credibility of a witness, they should consider that it is a rule of law—a presumption—that men testify truly and not falsely." 2 Thomspon on Trials, 2d Ed. sec. 2420, p. 1683.

Coming now to our own case, we find that some of the witnesses who testified against petitioners admitted their own lack of good morals in the very transactions (*eg.* 499, 466-7, 553-4). When the Court instructed the jury that the testimony of the government witnesses made out a "sufficiently substantial" (1705) case against the petitioners, and that only a "*prima facie*" case was required to justify conviction (1703-4), these instructions, coupled with the fact that the defendants called no witnesses, irrevocably spells out a situation where the arbitrary presumption was tantamount to a directed verdict of guilt. If witnesses are presumed to speak the truth, and if what they say makes out a "sufficiently substantial" (1705) case of guilt against the defendants then the trial has been reduced to mockery. We thus have not even the semblance of a fair trial guaranteed by the Constitution. Reasoning from this false premise, it necessarily follows that, if witnesses merely testify to a *prima facie* case, and since they are presumed to speak the truth, no question of fact is left for the jury's determination. The Court instructed the jury to take this presumption (that witnesses intend to speak the truth) into the jury room and use it in their deliberations, instructing them at the same time that as soon as their deliberations began, the presumption of innocence was not to be considered.

Any presumption that all witnesses intend to speak the truth is indeed artificial.[7] Artificial presumptions have been rejected by this Court in *Tot* v. *United States,* 319 U. S. 463; and in *Bollenbach* v. *United States,* 327, U. S. , 90 Law Ed. 318. The jury's freedom to entertain reasonable doubt of any and every witness, and, hence, reject it (*Hurwitz* v. *United States,* 299 F. 47), was impaired by the court's charge that in weighing the evidence and the witnesses' bias, they must bear this false presumption in mind.

IV

The trial court erred when it emphatically refused to charge, upon request, that the failure of certain petitioners to testify in their own behalf should not be used against them (1725-6). It was likewise error to make this charge belatedly, after the jury had deliberated for at least six hours at which time charge was made as to all defendants, including those who had specifically rejected such charge.

At the close of the charge to the jury, counsel for petitioners, Bird, Diaz and defendant Silverman, requested the charge to the effect that their failure to take the stand should not give rise to any presumption against them. (*Bruno* v. *United States,* 308 U. S. 287.) The Court then felt that this request was untenable (1738) and accompan-

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7 If this presumption be true, then can it fairly be argued that felons called as witnesses are presumed to tell the truth? (*Rosen* v. *United States,* 245 U. S. 467); or that accomplices must be believed? Is it likewise true that testimony of a private detective must be believed? (*Shettel* v. *United States,* 113 Fed. (2d) 34); And what about the self interest of defendants when they testify? Are all these to bow before this artificial presumption that witnesses intend to speak the truth?

ied the refusal by a comment that the question was "elementary" (1726). Shortly before the verdict, and after the jury had been out for six hours, the court took occasion, upon the jury's presence in the courtroom, to make the requested charge (1738, 1739).

The failure of the Court to charge when the case was first given to the jury was manifestly error (*Bruno* v. *United States,* 308 U. S. 287).

It may be that when the charge was first denied, only those petitioners who had requested it had ground for complaint. But when the charge finally was given, all had been aggrieved, for the grievance of those who requested the charge had not been removed, and those who did not request the charge now had reason to complain. The petitioners who did not request the charge did so out of desire not to have the matter of their failure to testify referred to at all. However, if the charge is to be given, and the matter of the defendant's failure to testify called to the jury's attention, despite the non-assenting defendants, the time to do it was when the case was given to the jury.

If the failure of defendants to testify did enter into the jury's deliberations for six hours in consequence of the omitted charge, the damage was done, and could never be cured. The belated giving of the charge could not have benefitted them and very probably harmed them. (See *Dodson* v. *United States,* 24 Fed. (2d) 401, 403, to the effect that instruction beneficient to defendants should be given at same time other instruction are given.)

Merely because there were a number of persons being tried together, no reason existed for depriving any one of the defendants of his own basic right to a fair and impartial trial. Every defendant was entitled to constitutional protection as if he were tried alone, and if one defendant desired to waive a constitutional or statutory right, and the

other insisted upon the same right, each was entitled to have his own request granted. When the Court ultimately charged, in the language of *Bruno* v. *United States, supra,* it made its charge for all defendants, including those who had not asked for it, and who had deliberately chosen to refuse it. The net result was that as to Bird, Diaz and Silverman, the charge that they received was too late. As to the other petitioners, the charge they did receive was an unfair and improper comment on their failure to testify.

V

The critical issue—did defendants place or cause to be placed the alleged matter in the mails?—remains unanswered by the jury's verdict. The court instructed the jury that they need not decide this question, that it was sufficient if any mailing at all occurred. Thus, the *sine qua non* of the case is lacking.

The trial court instructed the jury (*supra,* 1714): "Under such facts, it is not necessary for the jury to find that it was any defendant on trial who has been proved to have 'placed' or 'caused to be placed' * * * any mailable matter in the United States mail * * * if, as a matter of fact, the use of the mails has actually been proved beyond a reasonable doubt."

This is the most fundamental conceivable error in a case consisting entirely of mailing counts. The indictment specifically alleges in each count that the defendants did place or cause to be placed the mailable matter in question in the mail. This is indeed an essential element (*United States* v. *Cohen,* 145 Fed. (2d) 182, 190, cert. denied, 323 U. S. 793; *Freeman* v. *United States,* 20 Fed. (2d) 748, 750).

It follows that the *sine qua non* of the case—a jury's determination that the defendants placed or caused to be placed in the mails the things alleged in the indictment, is lacking. The charge of the Court was wrong in so vital a regard that the guilt or innocence of the defendants actually remains undecided. No matter what the trial court may have said on the subject elsewhere in the charge, what was said here was wrong and requires reversal.

The crucial issue of this trial was whether defendants had placed or caused to be placed certain matter in the United States mail. As above indicated, the Court took this issue from the jury. The language of this Court, in *Bihn* v. *United States,* U. S. , 90 Law Ed. 1208, 1211, is quite appropriate: "Instructions to acquit, if there was reasonable doubt as to petitioner's guilt, were given in other parts of the charge. Those were general instructions. They would be adequate, standing alone. But on the crucial issue of the trial—whether petitioner or one of four other persons stole the coupons from the bank—no such qualification was made; and the question was so put as to suggest a different standard of guilt. * * * And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears."

VI

The evidence adduced at the trial was insufficient to warrant the submission on Counts 1 and 2 to the jury. It was thus error to sustain the conviction of these counts.

A

The testimony failed to disclose where the letters were mailed or that in fact they were mailed.

To avoid repetition, we respectfully refer to our discussion under "The Evidence", "Counts 1 and 2". It is clear that the envelope was not offered in evidence, and that the only testimony concerning the use of the mails is based upon a statement by a bank officer that under ordinary usage the letters involved in Counts 1 and 2 came to his bank through the mails. The source of the mailing was abortively presented upon the theory that each letter was on stationery which bore the heading, "M. C. Baker, New Orleans, Louisiana." From this latter fact, the Court instructed the jury that they could draw the inference that both letters were mailed from New Orleans (463). This statement was made after the United States attorney stated that he had no other proof on this subject (463). Thus, it appears that from a statement on a letter, the Court authorized the following presumptions: first, that the letter was enclosed in an envelope addressed at New Orleans to the bank in Jackson, Mississippi; second, that defendant, Baker, whose name was purportedly signed to the letter (there was no identification of the signature) had caused the letter to be duly stamped and mailed; and third, that the post office at New Orleans had received the letter and delivered it to the bank at Jackson, Mississippi. We

paraphrase the language of *Brady* v. *United States,* 24 Fed. (2d) 399, 403: "To do this, we would have to permit presumption to be built upon presumption. From the fact that the letters contained in themselves the address of [M. C. Baker, New Orleans, Louisiana], the presumption would have to be drawn that they were enveloped, properly stamped and addressed to [the bank at Jackson, Mississippi]. From this presumption, the presumption would have to be raised that the defendant [Baker] caused them to be mailed, so addressed, and from the last presumption, the presumption would have to be drawn that the post office establishment delivered them at [Jackson, Mississippi]. It is well settled that presumptions cannot be based on presumptions. *Vernon* v. *United States* (CCA 8) 146 F. 121, 126. We conclude that the evidence was insufficient to support the verdicts of guilty. See *Freeman* v. *United States* (CCA 3), 20 Fed. (2d) 748."

On the same subject, see also *Davis* v. *United States,* 63 Fed. (2d) 545, 546; *Mackett* v. *United States,* 90 Fed. (2d) 462, 464; *United States* v. *Baker,* 50 Fed. (2d) 123.

The government attempted to sustain this type of proof by reference to *Steiner* v. *United States* (Fifth Circuit), 134 Fed. (2d) 931, but failed to point out that in addition to the markings on the letterhead, an envelope was offered into evidence, and a witness testified that the defendant had admitted the use of the mails with regard to the particular letters. It thus affirmatively appears that there was no proof where the letters were mailed or that in fact the mails were actually used to transmit them.

B

There was no testimony offered to show what accompanied the letters and whether the deeds contained therein were "securities" under the Securities and Exchange Act.

It is conceded that the two deeds accompanying the letters in Counts 1 and 2 were never offered in evidence. Thus, no proof existed concerning the very terms and context of those deeds. In fact, it was never established that the land sold by the defendant, Silverman, to Miss Duling was the same which was said to have been conveyed to him through these deeds. The testimony failed to disclose to whom the deed in the letter referred to in Count 1 was delivered and as to Count 2, it appears that the deed was returned to Baker. It thus appears that it was not proven, and that no inference could be drawn, that these deeds were an instrument of fraud, or were used in connection or in furtherance of a scheme to defraud, alleged in the indictment. Merely because two lower courts have made concurrent findings on this subject does not relieve the Supreme Court of the task of examining the foundation for findings in this case (*Baumgartner* v. *United States,* 322 U. S. 665).

Where clear error such as this is shown, no rule of reliance applies. Moreover, it is significant to note that in the opinion of the Circuit Court, petitioners' arguments on this phase—the lack of proof as to Counts 1 and 2—was completely ignored and the Circuit Court made no explicit finding on the connection of the deeds in Counts 1 and 2 with the scheme to defraud.

C

The deeds referred to in Counts 1 and 2 were not "securities".

"It [the Securities Act] affects not ordinary land sale contracts, but 'investment contracts' which evidence primarily a right to participate in the proceeds of an income-producing venture, membership in which is secured through entrusting an investor's capital to the management of others." (*Securities and Exchange Commission* v. *Bailey,* 41 F. Supp. 647, 650.)

In none of the other deeds in evidence (none were offered to support Counts 1 and 2) does the Plaquemines Land Company, grantor, undertake any commitments to exploit the land sold, nor is their testimony even of any collateral undertaking of this nature. True, the deeds are made subject to the rights of a lessee to drill for oil, and concomitantly, the conveyance carries with it the right to share in the proceeds of successful exploitation by the lessee but such provisions are analogous to those contained in any deed of property where a business tenancy exists and hence requires that the transfer of ownership carry with it both the benefits and the burdens of the tenancy. Such benefits may well be contingent in accordance with some criterion of successful exploitation of the premises by the tenant, such as gross receipts, or profits, but it has never been suggested that such factor renders a deed of property so characterized as a "security."

Nor do we have an "investment contract" here. Moreover, the evidence shows that the land was purchased in quantities allegedly represented by the particular defendants making the sale as sufficient for drilling sites, hence

the sales in our case was essentially that of land not of "fractional undivided interests in oil and gas rights."

In the absence of contractual undertaking for exploitation of the property by the grantor itself, the Security and Exchange Act does not apply.

Securities and Exchange Commission v. *Joynor Leasing Corp.*, 320 U. S. 344;
Securities and Exchange Commission v. *Bailey*, 41 F. Supp. 647, 650.

D

The failure of the Circuit Court of Appeals to make a determination as to whether these deeds were "securities" deprived petitioners of an intermediate decision. The question—are cash deeds "securities"—is important and novel and ought to be decided.

The Circuit Court reasoned that since the sentences imposed on defendants, on Counts 1 and 2, were concurrent with the sentences imposed on Counts 4 and 5, it was unnecessary to determine whether the deeds in Counts 1 and 2 actually were securities (2399). This was error on two scores. First, conviction of Counts 4 and 5, as will be shown under VII and VIII infra, is not to be sustained on grounds intrinsic to those counts. Secondly, if the Securities And Exchange counts are erroneous, the situation as it now stands is that the evidence under those counts presumptively contributed to the verdict of guilty on the other counts that were submitted to the jury, in view of the fact that the case was given to the jury as a single comprehensive scheme. Hence, the question is not one of erroneous sentence, but of conviction upon evidence not properly admissable if the Securities And Exchange counts are indeed invalid.

We respectfully urge that this Court remand this case to the Circuit Court to make the requisite finding, if this Court fails to agree with us that conviction under Counts 1 and 2 must in any event be reversed upon the other grounds set forth in this Argument. (*Gerdes* v. *Lustgarten*, 266 U. S. 321, 327; *Lutcher & M. Lumber Co.* v. *Knight*, 217 U. S. 257, 268.)

VII

The proof under Count 4 was insufficient as a matter of law. It was error to sustain the conviction on this Count.

A

The transmission through the mails of the check after the transaction was completed was not a violation of the statute. (*Kann* v. *United States*, 323 U. S. 88.)

We respectfully refer this Court to our discussion under "The Evidence"—"Count 4". The sale of the land to Fowler by Diaz had been completed. The deed had been delivered and the transaction completely closed. Some time later, Diaz deposited check for the balance of the payment for the land in his account in New Orleans. The check was forwarded by the New Orleans bank for payment to the bank upon which it was drawn in Pensacola, Florida. This is the very situation under which this Court, in the *Kann case supra*, reversed the judgment of conviction. Any mailing after the completion of a particular transaction cannot be said to have any relevancy to the transaction itself. Under the Statute, the mails must be used "for the purpose of executing" (Title 18, U. S. C. 338) the scheme, and subsequent use is not penal. Just like the defendant Willis in the

Kann case, Diaz had deposited the check to his account. "The scheme had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." *Kann* v. *United States supra,* at page 94.

B

There was no proof that the acts of Diaz or Baker in the transactions preceding the mailing involved in Count 4 were pursuant to and in furtherance of the scheme to defraud.

Assuming even that a conspiracy or scheme linking Kiefer and Silverman with the petitioners has been shown to have existed, the fact remains that there is no evidence that it was part of the conspiratorial arrangement that forgery and fraudulent sales of the same property to different grantees be effected. Testimony by some grantees of the land company concerning individual transactions clearly outlines the pattern of representation and *modus operandi* of the salesman of the land company. No grantee other than Fowler claimed that he had been sold land already conveyed by the grantor to another. Thus, it is clear that when Kiefer and Silverman erased the name from a deed and conveyed land to Fowler they had no right to sell, Kiefer and Silveman had embarked upon a private criminal venture far beyound the breath and scope of any scheme with which the petitioners might have been linked.

Moreover, the testimony shows that petitioners, Baker and Diaz, on discovering the acts of Kiefer and Silverman,

exposed them to Fowler, and repudiated the entire venture. Baker and Diaz sought to help Fowler recoup his loss by selling him other land at cost. Whether or not Baker and Diaz actually benefited Fowler is besides the point, except that it may be noted that the government is bound by the testimony of its witness, Fowler, that he still considers that Baker and Diaz did him a favor (1334). The fact remains that there is no evidence that the acts of Kiefer and Silverman were performed pursuant to or in furtherance of the conspiracy alleged or proved, and that, on the contrary, there is evidence that Kiefer and Silverman acted, unilaterally, and independently, and independently and beyond the scope of any arrangement that might have subsisted between them and the petitioners.

C

Assuming that a scheme to defraud was established, it still was the function of the jury to determine whether the acts of Diaz and Baker under Count 4 were part of that scheme. The jury, however, was ordered to consider the case on the theory of "one scheme" and that the act of any defendant was the act of all. Thus, reversible error was committed.

There is every indication that the testimony of fraud on the part of petitioners BAKER and DIAZ in the transactions involved in Count 4, if not entirely non-existent is so weak and equivocal, that the jury conviction of them on this count represents an attribution to them of the guilt of Kiefer and Silverman, under the counts' authorization, to charge each defendant with the acts of all, rather than any finding that their own acts were intrinsically fraudulent. Certainly, it cannot be assumed that the jury did in fact predicate conviction of petitioners upon their own acts.

The case was submitted to the jury by the Trial judge in terms of the indictment as a single scheme and plan. Throughout the trial we find the trial judge insisting that "it was a common design between the defendants" (1209). Thus, the court overrules the objection by petitioner Baker's counsel that the evidence as to Kiefer's acts in his transactions with Fowler relate to a private matter (1209) and going beyond this error, the trial Court affirmatively and solemnly informs the jury that, "The charge is that it was a common design, and any act that the jury finds, after a review of the evidence * * * to have been proved by either definite testimony or circumstantial evidence, or by legal inference, they feel justified from the evidence before them in finding was done by any one of the defendants, is competent as against every other defendant, if the jury does find that they acted in collaboration one with the other (1209, 1210).[8]

Conspicuous by its absence is the essential qualification and condition that the thing done by one defendant to be binding upon the others must have been done in furtherance of the conspiracy.

The case was submitted to the jury as one scheme and the jury was thus effectively directed that as a matter of law every fraudulent act testified to was thus necessarily within the scope of this scheme (1702, 1706, 1708, 1710). The trial court, as already noted, refused to consider any objection that a fraudulent act on the part of one defendant might not be within the scope of the conspiracy.

The crux of the reversible error presents itself, in the demonstration thus made, that the jury was not at liberty

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8 See also the Court's somewhat remarkable statements about the jury right to decide whether the defendants were "operating in this or any other case" (982).

to refuse to attribute to petitioners the alleged fraudulent acts of Kiefer and Silverman in the transactions proved under Count 4. If the jury found that Kiefer and Silverman were guilty of fraud in their transaction with Fowler, then *ipso facto,* so were petitioners, for the Court tied petitioners irrevocably and beyond redemption to Kiefer and Silverman by ordering the jury to accept from the Court the law that there was a single conspiracy. The Court's error was aggravated by the explicit instruction, a co-conspirator "is held to have adopted as his own the past and *future* acts of the other conspirators, even though subsequent activities in pursuance of the conspiracy are extended beyond his own original intent in so attaching himself to the conspiracy" (1709). This charge was wrong because if activities of a co-conspirator go beyond original intent, such activities become his own private venture.

"The acts and declarations of confederates, past or future, are never competent against a party except insofar as they are steps in furtherance of a purpose common to him and them." (*United States* v. *Lekacos,* 151 Fed. (2d) 170, 172; *United States* v. *Peoni,* 100 Fed. (2d) 401; *United States* v. *Falcone,* 311 U. S. 205.)

The Circuit Court in its opinion overlooks the vital point that the jury was forestalled from determining that the fraudulent acts of Kiefer and Silverman in the Fowler transaction represented a private transaction. Once the jury decided that Kiefer and Silverman acted fraudulently, they were compelled to hold petitioners responsible for it, as part of the common plan and design.

The Circuit Court conceded that there was evidence that Silverman and petitioner Baker had been "dealing with each other at arms' length" (2408), but mistakenly reasoned that the jury had determined the facts to the contrary,

whereas, the crucial consideration at this juncture is the point that the jury were denied the right to determine whether specific acts by defendants represented criminal schemes or individual crimes outside of the single scheme submitted to them. The jury was thus compelled to attribute guilt to everyone rather than limiting responsibility according to the evidence. *Kotteakos* v. *United States,* 90 Law Ed. 1178, is eloquent authority for the proposition that reversible error permeates the case.

Another phase of the Circuit Court's error is the reasoning that "the conspiracy in which Silverman was engaged, if it was a separate conspiracy, was so closely connected with the main, the general conspiracy, as that variance could not affect, and has not affected, his substantial rights * * *" (2409-10). Here the court overlooks the point that if there be not one but two conspiracies, and if the two be closely connected, as the Court states, the consequence is that the testimony relevant to one of the crimes so deeply stains and generally impugns the accused as to give genuine plausibility to the chance for prejudice. In *United States* v. *Lekacos,* the Circuit Court of Appeals for the Second Circuit (151 F. 2nd 170) in affirming the judgments of conviction, which were reversed by this Court in *Kotteakos* v. *United States,* 90 Law Ed. 1178, nevertheless recognized that where testimony does so stain and impugn co-defendants who are actually not in the same conspiracy that prejudice must result. Had the Second Circuit found the same close connection that the Fifth Circuit finds in our case, it, according to the opinion of Circuit Judge Learned Hand, would have reversed the conviction first-hand. Thus, the very argument that the Fifth Circuit gives for sustaining the conviction is the outstanding reason that it should be reversed.

VIII

The proof under Count 5 is insufficient. It was error to sustain the conviction on this Count.

A

The return of a recorded deed through the mails by a Recording Agent was not a violation of the Statute.

Our discussion under "The Evidence"—"Count 5", makes it clear that the mailing of a deed by the recording officer to Miss Duling was even further removed from the execution of the scheme to defraud than the mailing of the check under Count 4. The proof definitely establishes that Miss Duling acquired title upon delivery of the deed. She parted with her money and the transaction was definitely completed. While the mailing of the check in the *Kann* case (*supra*) was described as "merely incidental and collateral to the scheme and not a part of it" (at page 95), the mailing of the deed after recording does not qualify as even being incidental or collateral to the sale of the land. It is entirely independent of it.

Even the trial court recognized the fact that the transaction had been completed, but attempted to justify its position upon the theory that the general scheme had not been shown to have terminated (902-903). The trial court erred on this subject in view of the law as this Court set forth in the *Kann* case. There too, the general scheme continued after the mailing. However, it was held that the point involved was the fact "that the scheme was completely executed as respects the transactions in question" (323 U. S. at page 95).

B

There was no allegation in the indictment that the return of a deed through the mails by a Recording Officer was part of the scheme.

It is noteworthy that the indictment herein, which goes to great particulars in describing the scope of the so-called "single scheme" to defraud, and alleges many acts as being "in furtherance of" the said scheme, fails completely to allege that the recording of the deed was an essential element of the scheme and that the return through the mails by a recording officer had anything to do with furthering the scheme. Thus, there was no support whatever for the submission of Count 5 to the jury (*Mitchell* v. *United States*, 126 Fed. (2d) 550, 554).

C

The transaction between Kiefer-Silverman and Duling was not a part of the "single scheme".

As demonstrated in our discussion of the evidence under this count, the transaction which resulted in the giving of this deed and its subsequent recording was between Silverman-Kiefer and Duling. It was clearly established that none of the other petitioners had the slightest interest, financial or otherwise, in this venture. It was completely apart from anything the petitioners had done. Our argument under "VII" "C" *infra* is pertinent and the Court is respectfully referred thereto.

IX

The Circuit Court erred in sustaining the convictions because the evidence showed a number of separate and independent schemes and not a single general scheme charged in the indictment.

We have already shown that even if a general scheme existed, the transactions constituting the proof under Counts 1, 2, 4 and 5 were not part of that general scheme and that the jury was not so free to determine. We now urge that no general conspiracy had been shown to exist.

We have under "The Evidence" shown the existence of several separate groupings or schemes to which we respectfully refer the Court to avoid duplication at this point. Under our footnote "3", it was shown that there were at least nine, if not more, independent groups of persons who were pursuing the same purpose—selling certain land. The error of permitting testimony of the acts of Kiefer and Silverman to be held against petitioners, as well as the error of permitting evidence concerning independent acts of individual defendants to be held against all the defendants indiscriminately "permeated the entire charge, indeed the entire trial. Not only did it permit the jury to find each defendant guilty of conspiring with * * *" all the others, it prevented the jury from considering "the evidence relating to each conspiracy separately from that relating to each other conspiracy charged". Merely because persons conspire to commit a crime, they nevertheless are not deprived of the constitutional safeguard "to individualize each defendant in his relation to the mass. Wholly different is it where those who join together with only a few, though many others may be doing the same, and though some of them may line up more than one group * * *". The

petitioners did not receive a fair trial. The "transference of guilt from one to another across the line separating conspiracies subconsciously or otherwise" was "so great that no one can really say a prejudice to substantial right has not taken place" (*Kotteakos* v. *United States,* Law Ed. 1189, 1191). Upon the reasoning and the authority of the *Kotteakos* case, the denial of the motion for a directed verdict with respect to all of the counts was error, and the Circuit Court's determination to sustain the conviction was likewise error.

CONCLUSION

The writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 484

(should be ahead of prior petition)

MILLARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. LEVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ and EMANUEL M. BURGIN,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION AND BRIEF ON APPLICATION FOR REHEARING

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IN THE

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MILLARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. LEVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ and EMANUEL M. BURGIN,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION AND BRIEF ON APPLICATION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully pray this Court to reconsider its determination made on October 28th, 1946, which denied their petition for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review judgments of conviction under the Mail Fraud Act (18 U. S. C. 338) and mail counts under the Securities and Exchange Act (15 U. S. C. 77q).

Your petitioners respectfully submit that special and important reasons for the granting of the writ of certiorari subsist in this cause, and that the denial of certiorari herein, in the face of these considerations, unsettles federal criminal law at its very monuments and leaves not only

your petitioners bereft of the bare essentials of a fair trial but foreshadows a like fate for all accused and brought to trial in our courts.

Where special and important reasons call for this Court's exertion of its power of supervision within the scope of Rule 38, Subdivision 5, of the Revised Rules of the Supreme Court, and this Court nevertheless denies certiorari, the courts are prone to invest such denial with the significance of this Court's sanction of the procedure, practices and determinations which are questioned by the petitioners (*Campbell River Mills Co.* v. *Chicago, etc., Co.*, 42 F. 2d 775, 778).

The following questions therefore thrust themselves upon our attention:

1. Does this Court intend to overrule *Coffin* v. *United States*, 156 U. S. 432, 456-461; and *Cochran* v. *United States*, 157 U. S. 286, in their holding that the jury may consider the presumption of innocence along with the evidence in the case in determining guilt or innocence?

2. Does this Court itself declare "that, under the law, every witness is presumed to intend to speak the truth" and that such instruction to the jury may be given by a trial judge in a case in which the only witnesses are the government's witnesses?

3. Does this Court acquiesce in and give sanction to the instruction that the jury need not determine that defendants either mailed or caused to be mailed any mailable matter in order to be guilty of crime under mailing counts in an indictment?

4. Where such matters involving the fairness and integrity of judicial proceedings, and the standards whereby

guilt and innocence are to be determined are in issue, does this Court intend to hold that either the inadvertence of counsel in particularizing objection, or this Court's own view of the defendant's lack of innocence can serve to allay the affront to the integrity of the judicial process itself?

I

The trial court did assume a position diametrically opposed to that of this Court in *Coffin* v. *United States,* 156 U. S. 432, 456-461. What could be clearer rejection of the doctrine of the *Coffin* case than this language of the trial court:

> "But this presumption of innocence will avail the defendants no further so soon as prima facie evidence of the charges laid against them in the indictment is presented to the jury * * * because the presumption is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established" (1703).

This Court has never overruled its condemnation of such an instruction. In *Miklencic* v. *United States,* 62 F. 2d 1044, the Circuit Court of Appeals for the Third Circuit reads this Court's sequence of decisions on this subject thus: "In order properly to bring about the procedural consequences of such a presumption (Wigmore on Evidence (2d Ed.) Sec. 2491) the jury must be told about it, and how to handle it, namely, they should begin with the presumption that the defendant, although accused, is innocent, Holt v. United States, 218 U. S. 245, 253; *then consider the presumption along with the evidence in the case,* Allen v. United States, 164 U. S. 492, 501; and finally that it stands in favor of

the accused until such time as they shall find beyond a reasonable doubt it has been overcome by evidence to the contrary. Coffin v. United States, 156 U. S. 432, 459, 460; Agnew v. United States, 165 U. S. 36, 51; Holt v. United States, supra; Dodson v. United States (C. C. A. 23 F. 2d 401, 402)." (Emphasis supplied.)

This Court's views are emphatically and explicitly summarized in *Dodson* v. *United States,* 23 F. 2d 401, 402, by the Circuit Court of Appeals for the Fourth Circuit:

> "(1) The presumption of innocence, which from time immemorial the law has thrown around a person accused of crime, means more than merely that the jury shall go into the trial with a belief that the accused is probably innocent. It is a presumption of law which must be weighed by the jury along with the evidence in the case in arriving at their verdict. Coffin v. U. S., 156 U. S. 432, 15 S. Ct. 394, L. Ed. 481; Wolf v. U. S. (C. C. A. 4th) 238 F. 902; Hyde v. U. S. (C. C. A. 4th) 15 F. (2d) 816; Wharton's Crim. Evidence (10th Ed.) p. 627; Greenleaf on Evidence (Lewis' Ed.) par. 34, p. 49; 16 C. J. 535, 983. It is true, as said in Allen v. U. S., 164 U. S. 492, 501, 17 S. Ct. 154, 157 (41 L. Ed. 528), that it is 'driven out of the case' when the guilt of the accused is established beyond a reasonable doubt; *but this does not mean that jurors may ignore it when coming to consider their verdict at the conclusion of the case.*" (Emphasis supplied.)

The trial court herein, however, admonished the jury that they must indeed ignore the presumption of innocence when coming to consider their verdict. (See our main argument, pages 26 to 30 of Petition and Brief for Certiorari.)

II

The Solicitor General confesses that it was error for the Court to instruct the jury *"you will bear in mind that under the law, every witness is presumed to speak the truth"* in this case in which the only witnesses are government witnesses (p. 23 of Solicitor General's brief).

The Solicitor General, however, argues that the error was tempered by the fact that the Court had left to the jury the function of judging the credibility of the witnesses. However, the very gravamen of our complaint is that the jury was not left free to judge such credibility, but were expressly required to do their judging upon scales weighted with this arbitrary presumption. In effect, the Court gave only lip service to the rule that it was for the jury to weigh credibility. Actually, he was directing a verdict against the petitioners, via this "presumption." (See Petition and Brief for Certiorari, pages 32 to 34.)

III

The Solicitor General confesses error in the charge that *"it was not necessary for the jury to find that it was any defendant on trial who has been proved to have 'placed' or 'caused to be placed' the matter in the mails."* The Solicitor General, indeed, concedes that there might be some merit in petitioner's position "that the judge committed a very fundamental error in giving this instruction" (p. 27 of Solicitor General's brief).

He contends, however, that the Court's preceding definition of the phrase "caused to be placed" cured the error. On the contrary, the error is aggravated by the Court's discussion of the meaning of "caused to be placed" for

the Court explored the relatively broad meaning of the language, and thereby accorded an equally broad meaning to the effect of the erroneous charge. The error is squarely presented for review by this Court. (See Petition and Brief for Certiorari, pages 36-37.)

IV

Petitioners' counsel at the trial never affirmatively waived any rights. Their actions never qualified for characterization as anything more than simple inadvertence. At page 1724 of the Record, the Court was correcting a phase of its charge which had left the impression that defendants must offer evidence upon their own behalf. It was this correction which counsel for one of the petitioners accepted (1724).

The purported correction deals not at all with the presumption of innocence (see *Coffin* v. *United States,* 156 U. S. 432, 460) and hence no affirmative waiver appears in the case. There remains only the fact that this Court, out of regard for the integrity of the administration of criminal justice, should not refuse to grant certiorari either in consequence of petitioners' counsel's inadvertence in noting objections (*Brasfield* v. *United States,* 272 U. S. 448) or this Court's own views as to the guilt of the petitioners. The length of time spent by the jury in deliberating the case indicates that the triers of the facts were assigning weight and substance to the elements of defense of at least certain of the defendants. Under such circumstances, this Court is not warranted in denying certiorari. (*Bollenbach* v. *United States,* 327 U. S. , 90 L. Ed. 318, and *Kotteakos* v. *United States,* U. S. , 90 L. Ed. 1178.)

CONCLUSION

Petitioners respectfully urge this Court to rescind the determination made on October 28, 1946, denying their petition for a writ of certiorari and that it grant such writ to the United States Circuit Court of Appeals for the Fifth Circuit to review the convictions herein.

Respectfully submitted,

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CITATIONS

717391—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 484

MILLARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. LEVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ, AND EMANUEL M. BURGIN, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 485

NATHAN SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 486

RUBEIN V. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 2397–2409) is reported at 156 F. 2d 386.

JURISDICTON

The judgment of the circuit court of appeals was entered July 10, 1946 (R. 2410), and petitions for rehearing were denied August 12, 1946 (R. 2440). The petitions for writs of certiorari were filed September 10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury with regard to (a) the presumption of innocence, (b) credibility of witnesses, (c) the failure of petitioners to testify, and (d) the requisite proof of petitioners' connection with the use of the mails.

2. Whether there was adequate proof of the uses of the mails charged, and that the mails were used in furtherance of the scheme to defraud.

3. Whether there was proof of a single scheme to defraud as charged in the indictment.

4. Whether "cash deeds" conveying parcels of land and undivided interests in royalties on aggregated parcels, coupled with collateral agreements and promises as to exploitation operations, are securities within the meaning of the Securities Act of 1933.

5. Whether petitioner Johnson was denied a speedy trial.

STATUTES INVOLVED

The Securities Act of 1933 (48 Stat. 74, as amended, 48 Stat. 905) provides in pertinent part as follows:

> SEC. 2 (1). The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. [15 U. S. C. 77b (1).]
>
> SEC. 17 (a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. [15 U. S. C. 77q (a).]

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

A seven-count indictment was returned in the District Court for the Eastern District of Louisiana on September 4, 1942, charging that petitioners and certain others[1] had conceived and executed a scheme to defraud certain named investors in the sale of securities and had used the United States mails in furtherance thereof (R. 2–36). The scheme to defraud is fully set forth in count 1 (R. 3–18) and incorporated by reference in all of the subsequent counts, each of which is predicated on a different mailing. Briefly, the scheme described in count 1 was that petitioners created and controlled the Plaquemines Land Company, which had acquired and owned considerable acreage of unimproved marsh and swamp lands located in Plaquemines and St. Bernard Parishes, Louisiana; that this land was leased to the Gulf Refining Company, giving Gulf the right to explore for oil on such land, with the lessor and lessee sharing the interest in any resulting mineral discovery; that petitioners then, by various fraudulent promises and misrepresentations, sold to various investors small parcels of the land together with fractional undivided interests in the mineral rights in larger tracts under lease to Gulf, the sales being evidenced by

[1] Others named in the indictment as confederates were Frank I. Kiefer, Jr., Henry Manzella, and Harvey M. Overgaard. Overgaard was named but not indicted because of his death prior thereto; defendant Manzella died prior to trial, and defendant Kiefer was in the Army at that time.

so-called "cash deeds", and that in carrying out the scheme, petitioners employed various devices described in the indictment, and more fully described in the discussion of the evidence, *infra*, pp. 9–13.

Petitioners introduced no evidence on their behalf but moved severally for directed verdicts on all counts after the Government had rested (R. 96–130). The attorney for the Government also moved to dismiss counts 6 and 7 because of his inability to prove the use of the mails there charged (R. 1678). The court directed verdicts of not guilty on counts 3, 6, and 7 (R. 1685, 133), and the jury found all the petitioners guilty on counts 1, 2, 4, and 5 (R. 133). Petitioners were given consecutive sentences on counts 4 and 5, aggregating from 5 to 8 years, and a sentence of 5 years each on counts 1 and 2 to run concurrently with each other and with the sentences imposed on count 4 or counts 4 and 5 (R. 171–184). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 2410).

The evidence in support of the convictions may be summarized as follows:

The Plaquemines Land Company was incorporated on March 14, 1911, under the laws of Louisiana and domiciled in the Parish of Orleans (R. 1669; Gov. Ex. 413, R. 2291). The scheme to defraud investors charged in the indictment began in the late 1930's and continued through the early

1940's. Many of the activities were carried on from the ostensible real estate offices maintained under the name of Kiefer and Silverman in New Orleans, in which many of petitioners were seen and business of the company transacted. (R. 1033–1042.)[2] The Plaquemines Land Company had acquired three large parcels of land aggregating over 40,000 acres in St. Bernard and Plaquemines Parishes in Louisiana, all of which was recorded under the name of Plaquemines Land Company. Various parcels of this land had been under mineral lease to the Gulf Refining Company beginning on June 13, 1935. The leases provided that Gulf would retain seven-eighths' interest in any minerals discovered, and that a one-eighth royalty on oil, gas, and other minerals found would go to the lessor in addition to the payment of an annual rental for the exploitation privilege. (R. 1596–1600.)[3] These leases, with one excep-

[2] A secretary employed at these offices testified as to coming to know Silverman, Diaz, Bird, Kaker, Kahn, Manzella, Kiefer, and Overgaard at the offices (R. 1036–1037) and as to the various activities of Plaquemines Land Company engaged in at those offices (R. 1036–1042).

[3] The leases to Gulf are shown in the record as follows:

Gov. Ex. 375, R. 1609, R. 2224–2235, covering St. Bernard Parish Land, dated June 13, 1935, expiring by its terms on June 12, 1940, release being issued by the Gulf company on August 1, 1940; Gov. Ex. 376, R. 1609, 2235–2244, covering St. Bernard Parish land, dated December 23, 1935, expiring for failure to pay rental on December 23, 1939, release being issued by the Gulf company on December 6, 1942; Gov. Ex. 377, R. 1597, 1600, 1609, covering St. Bernard Parish land, dated April 4, 1936, expiring after a ten year period; Gov.

tion, expired at intervals between December 1939 and May 1941 (R. 1601–1602). In the early part of 1940, petitioner Baker, president of the Plaquemines Land Company, contacted C. A. Lomax, a representative of the Gulf Refining Company, and requested that Gulf not terminate one of the then remaining leases (R. 1603). Mr. Lomax indicated that the company had finished its seismographic record of the land and was not interested in carrying the lease any longer (R. 1604). However, Baker asked Lomax whether he would not be willing to carry the lease on a free basis (R. 1604), telling Lomax that the reason for his request was that he, Baker, had deeds already printed which showed the land being under lease to Gulf (R. 1635). Lomax testified that he declined Baker's proposal because he was not joining any scheme to sell land (R. 1641), although final determination of that question was made by the Houston office of the Gulf company (R. 1642). Lomax further testified that while it was possible that there was oil on the particular lands and that Gulf could be mistaken, nevertheless this would be an "anomaly," and that from their in-

Ex. 378, R. 1609, 2244–2248, covering Plaquemines Parish land, dated April 24, 1936, release being issued by the Gulf company on September 23, 1941; Gov. Exs. 379, 379a, R. 1600, 1601, 2249–2252, covering Plaquemines Parish land, dated February 19, 1937, partial release issued by the Gulf Company on September 23, 1941; Gov. Ex. 380, R. 1600, 1602, 2253–2256, covering Plaquemines Parish land, dated May 26, 1937, expiring for failure to pay rental on May 25, 1941 release being issued by the Gulf company on May 6, 1942.

vestigation of the situation Gulf was satisfied that there was no oil there (R. 1614, 1624–1625).

Because of the size of the record and the number of investor-witnesses, it is impractical, within the limits of this brief, to set forth the details of all of the various sales made in pursuance of the scheme. Therefore, we shall describe the essential aspects of the scheme as generally practiced and illustrate with a few actual instances. The scheme was generally effected as follows:

One of the petitioners would approach an investor, in most cases an aged person and oftimes a woman (see, e. g.,[4] R. 292–293, 356–357, 465–466, 682–683, 965, 997–998, 1092), and offer to sell him or her a few acres, perhaps 5 or 10, of the Plaquemines Parish land. Typical representations made by the salesman to induce a purchase were that the land was in the heart of an area which was being heavily exploited by big oil companies, that Gulf Refining Company had an underlying lease on these very lands and was drilling for oil all around the area, and that, therefore, the investor would be wise to purchase the land which, when oil was discovered, as it undoubtedly would be, would become much more valuable (see, e. g., R. 348, 375, 509, 532, 571,

[4] As to each of the phases of the scheme and practices of petitioners, the record is replete with proof. We have for convenience confined our citation of record references to typical instances.

633, 789, 809, 849, 1067–1068, 1104–1105). In addition, the investor was often told that he would profit substantially on his share of the oil royalties that would be paid on the land, or that if he bought, he would get an oil well (see, e. g., R. 335, 342, 817, 1104–1105, 1136). Other misrepresentations were made, such as that the purchasers could live on the land or farm it (see, e. g., R. 532, 550, 788–789, 999, 1125). Additional sales were made to the same investors by one of several techniques. One device was to precede a second sales proposal with a visit by one of the petitioners, who touted the value of the land and the good sense or fortune of the investor in purchasing these oil properties, or who represented himself to be an agent of some large organization interested in buying large tracts of the land and paying a very substantial price, far above that which the investor had paid for the particular parcels, but stating that the organization would not purchase from the investor unless he had a larger tract to offer. Thereafter, another of the petitioners would call on the investor and offer to sell him additional parcels. The investor would then purchase additional land, but thereafter he would not see the party who had touted the value of the land or had offered to buy a large tract from him. (See, e. g., R. 559–574, 536–538, 805–810, 974–976, 906–922, 1163–1165.) Another technique was for one of the petitioners on the second or third visit to represent himself as an "insider"

in an oil company which was interested in buying up large parcels of the particular land and which would pay a very substantial price for such land. This "insider" would state that he could not go out and buy the land for his own account and resell it to the company because of his affiliation, but would offer to buy parcels of the land for the investor at a low figure and then resell it for the investor to his principal at a much higher figure, provided that he would be given an agreed substantial share (normally 15 or 20%) of the profit on such resale. The investor would then purchase some of the land which the "insider" obtained for him, but it was never resold as promised. (See, e. g., R. 414–415, 498–499, 509–512, 560.) While the foregoing techniques and misrepresentations were the principal ones practiced by the petitioners to sell the land, there were others, which will appear as transactions with some of the investors are detailed.

In effecting the foregoing sales devices, petitioners transacted business with the numerous investors in varying combinations. In every instance, from two to eight of the petitioners would see a particular investor at different times and in varying roles. In one case, a particular petitioner might be the original salesman, another petitioner the "independent purchaser" or touter giving the investor the impression that outsiders were interested in purchasing the land at high

prices, and a third or fourth petitioner would then make a second or subsequent sale. In another transaction petitioners would shift roles and the one who had previously played the part of salesman might become the independent purchaser. The record is replete with evidence showing that each of the petitioners at one time or another worked with most, if not all, of the other petitioners in connection with various sales. It is, of course, impossible within the limitations of this brief to detail the evidence showing these inter-relationships. However, an analysis of the record illustrating these connections is attached as an Appendix.

After the investor had agreed to purchase parcels of the land in Plaquemines Parish, and had given the salesman cash, checks [5] or notes to cover the purchase price, he received a so-called "cash deed" from Plaquemines Land Company as grantor over the signature of Baker as president thereof. The "cash deeds" were all substantially the same, and, in addition to the provisions describing and conveying the parcels sold to the investor, contained, without exception, provisions

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[5] Many of the checks were made payable to Plaquemines Land Company (see, e. g., Gov. Ex. 84, R. 1874; Gov. Ex. 86, R. 1879; Gov. Ex. 136–137, R. 1977). Those checks made payable to one of the petitioners were, in many instances, endorsed by one or more of the other petitioners (see, e. g., Gov. Ex. 33, R. 1785; Gov. Ex. 80, R. 1868; Gov. Ex. 83, R. 1873; Gov. Ex. 87, R. 1879; Gov. Ex. 89E, R. 1881; Gov. Ex. 94A, R. 1897).

such as the following (Gov. Ex. 20 at R. 1768–1769):

> The vendor hereunder reserves All of the mineral rights on the land herein transferred and in lieu thereof the said Plaquemines Land Company does by these presents grant, bargain, sell, set over, abandon and deliver with full warranty of title unto the purchaser of above described tract of land *An Undivided Prorata Part of All the Mineral Rights on the following described lands (of which the acreage herein transferred forms a part), as the acreage herein transferred bears to the whole.* Said lands being located in Plaquemines Parish in Township 16 South Range 16 East, to-wit: [followed by legal description of the sections subject to a Gulf lease]
>
> Under date of May 26, 1937, the Plaquemines Land Company granted unto and in favor of the Gulf Refining Company a ten year mineral lease covering the 1635 acres above described. Which mineral lease provides for payment to owner or owners thereof as their interest may appear of record of the usual one-eighth royalty on all oil, gas, and other minerals found and saved from said land and for an annual rental of twenty-five cents (25¢) per acre per annum pending drilling. Which mineral lease is recorded C. O. B. 85, folio 65. [Italics supplied.]

In almost every instance, the deed had either already been recorded when it was received by the investor from one of the petitioners person-

ally or by mail, or one of the petitioners assisted the purchaser in accomplishing the recordation (see, e. g., R. 349, 479–480, 790, 833–834, 1378). The deputy clerk of court at Point a la Hache, Louisiana (Plaquemines Parish), testified that it was the practice for Baker to mail or bring the deeds to his office and request him to record them and either return them to Baker or mail them to the indicated grantee (R. 1644). Moreover, each of the cash deeds delivered to the purchasers contained a clause stating that "Internal revenue stamps as required by law have been attached to *recorded* copy and cancelled" [Gov. Ex. 112 at R. 1949; italics supplied].

Transactions with typical individual investors were as follows:

In June 1941, petitioner Safir contacted Andrew E. Dupre, secretary of the New Orleans Athletic Club, for the purpose of selling him some of the Plaquemines land. Safir stated that the land was very valuable, and that drilling for oil would take place in the very near future. He showed Dupre a map and pointed out the Quarantine Bay area, which was near the Plaquemines Parish land, and stated to Dupre that the land he intended to sell him was along that section. He told Dupre that if a large company drilled, Dupre would participate in the proceeds on a per acre pro rata basis. Dupre thereupon purchased five acres at $25 per acre. (R. 397–400.) In August 1941, Dupre purchased an additional five

acres at $25 per acre from Safir (R. 405). Thereafter, in early September 1941, petitioner Kahn called upon Dupre and told him that he had found out from the public records that Dupre had purchased land in Plaquemines Parish and that a friend of his would like to discuss a similar proposition. Petitioners Kahn and Levy talked with Dupre, and Levy asked Dupre if he would be interested in purchasing more of the land at $60 per acre. Levy distinguished his proposition from the previous purchases made from Safir by telling Dupre that he would give Dupre a one-eighth royalty interest, whereas in Safir's sales, Dupre had obtained only a one-sixteenth interest. Levy further told Dupre that he was blocking a large portion of this particular land for the purpose of reselling it to associates in New York City. Dupre then purchased five acres at $60 per acre. (R. 406–410.) Later in the month of September, Kahn and Levy visited Dupre again and persuaded him to purchase five more acres by telling him that there had been a lot of activity in connection with the land and that they wanted to offer him some more of the land which a friend of theirs had purchased but could not pay for (R. 411–412). Subsequently, in September or October 1941, petitioners Levy and Kahn again sold Dupre five additional acres at $60 per acre on the representation that the land would be sold in New York at a very handsome

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profit, and that they would all participate in the profit on the resale (R. 413–415). Notwithstanding these repeated promises that the land would be resold, it never was (R. 417).

Prior to 1941, Rubein Johnson had sold some land in Texas to Miss Lorena Duling, a 78-year-old retired school principal in Jackson, Mississippi. That transaction was not, as she testified, "successful." In January or February of 1941, petitioner Silverman contacted Miss Duling and told her that Johnson was sorry about the Texas transaction and desired to give her five acres of Plaquemines Parish land. The "gift" was made, but three days later Silverman told her that she would have to pay $250, which represented one-half of the purchase price. She made this payment to Silverman, who told her that it was almost a certainty that some large oil concern would extend its holdings to the area close to her five-acre plot, that she would have to have twenty acres in order for her five-acre plot to be valuable, since twenty acres were necessary to have a drilling site, and that there was no doubt at all that within thirty to sixty days her land would be a desirable drilling site. Thereupon, Miss Duling purchased an additional fifteen acres at $90 per acre for a total of $1,350, which she paid in cash to the defendant Silverman. Silverman told her not to sell the land, because he believed that within a few days or weeks it would increase in value very much and that a big oil concern would pay

a good price for the property. He also told her not to sell unless she communicated with him and that he thought she could get as much as $200 an acre. (R. 893–900, 937–940.)

Petitioner Diaz then contacted Miss Duling and told her that he was a field buyer for one of the big companies and that he had found from the public records that she owned oil land. He offered to buy her parcels at $135 per acre and later in the afternoon increased the offer to $185 per acre on the ground that he had been so authorized by his company. He further told her that if she had more land in the same section, it would be more valuable. She told Diaz that she couldn't sell without consulting Silverman, whom Diaz denied knowing. Diaz told Miss Duling that when she got ready to sell, to communicate with him in New Orleans. She never saw him thereafter. (R. 906–919.) After the Diaz visit, Silverman advised Miss Duling not to sell and to purchase more land in the same locality. She then purchased a substantial quantity of land from Silverman at $90 and $100 per acre (R. 915–922). Petitioner Safir saw Miss Duling near the end of her transactions with Silverman and sold her five acres at $90 an acre after advising her to purchase the five acres because it would fit in the corner of her land and would thereby be a valuable piece of land to have (R. 925). Miss Duling, during the course

of the foregoing transactions, invested her total life savings, in the amount of $9,750 (R. 930).

ARGUMENT

The facts set forth in the Statement, *supra*, make it clear, as the court below well said, that "the proof presents a record of rascality and scoundrelism of the meanest and lowest kind, with a grinding of the faces of the poor * * *" (R. 2407). Petitioners, however, claim that numerous errors were committed by the trial court as a result of which their convictions should be reversed. Since the contentions in all three petitions are substantially the same, we will discuss them together in the following groupings and order:

1. Errors in the instructions with regard to—
(a) Presumption of innocence;
(b) Credibility of witnesses;
(c) Refusal of petitioners to testify;
(d) Mailings.

2. Proof of the mailing involved in count 4 and its relation to the scheme to defraud.

3. Proof of petitioners' connection with the mailing involved in count 5 and the relation of the mailing to the scheme.

4. Proof showing a single scheme as charged in the indictment.

5. Proof of mailings in counts 1 and 2.

6. Whether the "cash deeds" involved in counts 1 and 2 are securities within the meaning of the Securities Act of 1933.

1. (a) The trial judge instructed the jury on the presumption of innocence as follows (R. 1703–1704):

> * * * The defendants are not called upon to prove themselves innocent of such charges; they may rely upon the presumption of innocence that attends them at all times until and unless, in the course of the trial, they are proved guilty beyond a reasonable doubt. The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each of the defendants beyond a reasonable doubt. But, as forceful as that rule is in the protection of one who stands charged with crime, it must not be forgotten that it is not intended, nor has it ever been intended, as extending aid to one who in fact is guilty, so that he or she may escape just punishment. The rule is but a humane provision of law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but nothing more. You must, of course, give serious consideration to this presumption of innocence, when, once having retired to deliberate upon your verdict, you review, weigh and consider the whole body of the evidence. As I have stated, the burden rests upon the government, remember to prove, beyond a reasonable doubt, that the defendants are guilty of the charges laid against them in the indictment. But this presumption of innocence will avail the defendants no further, so

> soon as prima facie evidence of the truth of the charges laid against them in the indictment is presented to the jury. That prima facie evidence, if it satisfies the jury, beyond a reasonable doubt, of the guilt of the defendants bars the presumption of innocence, because the presumption is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established. If such prima facie evidence, which so brushes aside the presumption of innocence when found worthy of belief by the jury, is not met by the defendants' opposing satisfactory evidence, then that simple prima facie evidence, if it convinces you gentlemen of the jury, as the final judges of the fact, that guilt has been proved, beyond a reasonable doubt, would justify you in rendering a verdict of guilty as charged. * * *

At the conclusion of all of his instructions, the judge asked whether there were any objections or exceptions to the charge, because "if any counsel believes the Court has fallen into unconscious error, the Court will gladly hear suggestions from them for the possible correction of the error" (R. 1723). Counsel for the petitioners in No. 484 raised a question as to the clarity of the instruction regarding the effect of prima facie evidence (R. 1723–1724), whereupon the court further instructed the jury (R. 1724):

> During a part of the Judge's charge, there was specific reference to the subject

> matter to which Mr. Wilkinson referred and addressed the Court on, and the Court did charge you, and did intend to charge you, that if there is a case made out before you, beyond a reasonable doubt, by simple prima facie evidence, that would justify a verdict of guilty. There is no requirement under the law that any defendant offer any testimony. However, if the prima facie evidence, considered by you and deliberated over, convinces you beyond a reasonable doubt that the fact sought to be established has actually been established and proved to you in that fashion, beyond a reasonable doubt, that would justify action by you including a verdict of "guilty". * * *

The judge then asked whether that was "a satisfactory explanation or not," to which counsel replied, "I think so" (R. 1724). No other objections or exceptions were taken by any other of the defense counsel to the instruction in question here (see R. 1723–1739).

The court below held that under the foregoing circumstances petitioners were in no position to claim that error was committed by the trial court (R. 2403). We believe this conclusion is entirely correct, and that petitioners' contentions here that the instruction was highly prejudicial and erroneous (No. 484, Pet. 26–30; No. 485, Pet. 23–32; No. 486, Pet. 14–16) is without merit. In *Gomila v. United States,* 146 F. 2d 372 (C. C. A. 5), upon which petitioners rely, a similar inartfully worded instruction that prima facie proof of guilt beyond

a reasonable doubt is sufficient to overcome the presumption of innocence was held to be erroneous and that such error, accumulated with other errors which made the case a doubtful one on the evidence, required a reversal of the conviction. That is not the situation here. Moreover, the general tenor of the judge's charge on the presumption of innocence was not objectionable. At the outset of the disputed instruction, the trial judge emphasized that the defendants were not called upon to prove themselves innocent but could "rely upon the presumption of innocence that attends them at all times until * * * they are proved guilty beyond a reasonable doubt" (R. 1703). Although he spoke of overcoming the presumption by prima facie evidence, he explained that such evidence must be sufficient to convince the jury beyond a reasonable doubt, and that it could not be thus effective, unless not met by the defendants' opposing satisfactory evidence (R. 1703–1704). Moreover, since additional instructions on this point requested by one of the defense counsel for purposes of clarification were considered satisfactory by such counsel, and since no other objections to this charge were made, it is clear that later contentions on appeal attacking the instruction as unfair and improper were mere afterthought. An almost identical charge was involved in *Pasqua* v. *United States,* 146 F. 2d 522, arising in the same circuit court of appeals. In that case, as here, no timely objection

to the charge was made, and the Fifth Circuit held that "while that charge contains errors, the guilt of the defendants is so overwhelmingly shown by the record that we think the administration of justice does not require us to take notice of such errors." (146 F. 2d at 524.) This Court denied a petition for a writ of certiorari in which that conclusion was urged as error. 325 U. S. 855. Cf. also the charge in *Allen* v. *United States,* 164 U. S. 492, 500. And so here, in view of the overwhelming proof of guilt, the circuit court of appeals properly rejected petitioners' objection to the charge on the presumption of innocence, raised for the first time on appeal. *Johnson* v. *United States,* 318 U. S. 189, 201; *Holmgren* v. *United States,* 217 U. S. 509, 523–524; *Allis* v. *United States,* 155 U. S. 117, 122.

(b) For similar reasons there is no merit in petitioners' complaint (No. 484, Pet. 32–34) as to the court's instruction to the jury that "you will bear in mind that, under the law, every witness is presumed to speak the truth" (R. 1704). The foregoing sentence quoted by petitioners was immediately preceded by the instruction (not quoted) that (R. 1704):

> * * * In considering the credence and weight you should accord the testimony of any witnesses that you have heard testify, you will, as reasonable men, judge his or her demeanor on the witness stand, the manner of his or her testifying, which

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> may or may not have demonstrated to you an apparent lack of fairness, and unexplained hesitation or evasion in replying to any question or questions, or any bias or prejudice, either for or against either the government or any one or more of the defendants. * * *

While a court's statement that witnesses are presumed to tell the truth standing alone might under some circumstances be prejudicial, it could not be thus considered here, since it was tempered by the immediately preceding statement which unequivocally and properly left to the jury the function of judging the credibility of the witnesses from their demeanor in testifying, unexplained hesitation or evasion, or bias or prejudice. Moreover, in considering the claimed possibility of prejudice, it should be noted that the government witnesses were not impeached nor was there any material inconsistency in their testimony on direct and on cross-examination. These circumstances, coupled with petitioners' failure to make any objection or exception to the instruction (see R. 1723–1739), their failure to urge this point as error before the court below, and the overwhelming proof of guilt, forecloses petitioners' contentions that the instruction constituted reversible error.

(c) After the trial judge delivered his original instructions to the jury, counsel for petitioners Bird, Diaz, and Silverman requested him to charge the jury further to the effect that their

failure to take the stand would not give rise to any presumption against them. The other petitioners stated that they did not desire to join in this request. The court refused the charge, stating that the question was "elementary." (R. 1725–1729.) After the jury had been out approximately six hours, the judge recalled them, and, among other things, gave the jury the instruction that had been requested earlier, preceded by the statement to the jury that the court was in error in not granting the instruction when originally requested (R. 1736–1739). The judge then asked whether there were any objections or exceptions to this supplemental charge, but none was made (R. 1739). Petitioners' contention here, as in the court below, that this action of the judge constituted reversible error (No. 484, Pet. 34–36; No. 485, Pet. 34–37; No. 486, Pet. 12–14), is conclusively answered by the opinion below (R. 2404–2405):

> * * * Those defendants who told the court that they did not want any exception to the refusal of the court to give the charge certainly cannot be heard to complain of its not being given when first requested. The other defendants, who did ask for it and who, because they asked, were entitled to it and could, therefore, have complained if it had not been given,* are in no better case. Before the jury brought in its verdict, the court, after

*Bruno v. *United States*, 308 U. S. 287.

frankly confessing error, gave a full and correct charge on the point, and the defendants neither excepted to its giving nor asked further instruction. It is universally held that when an error has been committed and later it is corrected in a formal ruling of the court, it may not be assigned unless it is made clearly to appear that the situation was such that the correction did not remove the effects of the error complained of.** Appellants argue that this is such a case: that the jury having been allowed to go without being properly instructed and having deliberated for many hours, no doubt in that time discussing the failure of the defendants to testify, it was too late to do any good to instruct them in the matter just before they brought in the verdict. On the other hand, it may be more cogently argued that if when the jury came in for instructions they had not been able to make up their minds, but were still undecided, this charge given at defendants' request might well have been of the greatest value to them, indeed of far more value than if given as a part of the general charge. But these are speculations. The law is settled that cases are not reversed unless it appears that the error complained of has reasonably prevented substantial justice being done. Where, as here, the error has been openly confessed and deliberately corrected, with no complaint of

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**_Volkmor_ v. _U. S._, 13 F. (2) 594; _Frantz_ v. _United States_, 62 F. (2) 737.

> or exceptions to the manner or substance of the correction made at the time, the original failure to give the charge certainly can not be held reversible error.***

***Johnson* v. *U. S.*, 318 U. S. 189; *United States* v. *McGuire*, 64 F. (2) 485; *Burton* v. *U. S.*, 196 U. S. 283; *State* v. *Moody*, 167 Pac. 676.

Petitioners quote a part of the trial judge's instructions on the question of proof of mailing wherein the trial judge told the jury that (R. 1714)

> Under such state of facts, it is not necessary for the jury to find that it was any defendant on trial who has been proved to have "placed" or "caused to be placed" [matter in the mails in executing the scheme].

Petitioners contend that the judge committed a very fundamental error in giving this instruction in that he told the jury in effect that petitioners need not be shown to have had any connection with the mailing in order to find them guilty (No. 484, Pet. 36–37). If the foregoing quotation were the only charge given the jury on the question of the required connection with the mailings, there might be some merit in petitioners' position. However, petitioners have extracted this portion of the charge from its context; the entire charge on this subject made it clear that the jury could not find petitioners guilty unless they were shown to have had some connection with the mailing. Thus, in the sentences immediately preceding that

quoted by petitioners, the judge instructed (R. 1713–1714):

> * * * The word "caused" in the phrase used "placed or caused to be placed" in the mails has a relatively broad meaning and importance as the Supreme Court of the United States has held, and is used in the mail fraud statute in its well known sense of "bringing about". Therefore, when the indictment charges that these defendants "caused to be placed" certain therein described mailable matter, under the remaining counts four and five, of the original four mail fraud counts, the said defendants are one and all charged with having brought about the use of the mails in the execution of their alleged previously concocted scheme and artifice to defraud,—no matter that none of them ever contemplated or intended the use of the mails for the carrying out of such scheme;—no matter that none of them knew that the mails were being so used, they are, one and all, responsible for such misuse of the mails, if the use of the post office establishment was the natural, proper consequence of their act in so forming and planning said scheme or artifice to defraud, and might reasonably have been anticipated and foreseen by them.

This instruction was a sound exposition of the applicable legal principles. See, e. g., *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Kenofskey,* 243 U. S. 440, 443; *Graham* v. *United States,* 120 F. 2d 543, 546 (C. C. A. 10);

United States v. *Weisman,* 83 F. 2d 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Corbett* v. *United States,* 89 F. 2d 124 (C. C. A. 8); *Smith* v. *United States,* 61 F. 2d 681, 684 (C. C. A. 5), certiorari denied, 288 U. S. 608. It is apparent, therefore, that the charge as a whole gave the jury a clear and correct impression of the legal principles applicable in determining petitioner's responsibility for the use of the mails. That it must have been so understood by petitioners is apparent also from the fact that no objection or exception of the character here in question was made when the instruction was given (see R. 1723–1739), nor was this point raised in the court below. Under such circumstances, petitioners are in no position to make such a contention here.

2. Count 4 of the indictment was based upon a sale by petitioner Diaz to Mr. and Mrs. M. E. Fowler (R. 28–29). In connection with that sale, Mr. Fowler gave Diaz a check dated June 26, 1940, for $1,395, drawn on a Pensacola, Florida, bank, payable to Diaz (Gov. Ex. 323, R. 2155). Diaz deposited the check in his New Orleans bank, and thereafter, according to the testimony of an official of the New Orleans bank, the check was cleared in the ordinary course of business through the United States mails for collection on the drawee bank in Pensacola (R. 1026–1030). Petitioners raise several objections to the proof on this count. First, they argue

that the use of the mails was not clearly shown, since the envelope in which the check was transmitted was not introduced in evidence, and because the use of the mails was proved only by custom and usage; and second, that the clearance of this check through the mails was not part of the scheme to defraud but came after the completion of the particular sale in question, so that mailing was not a basis for conviction for mail fraud under the controlling authority of *Kann* v. *United States,* 323 U. S. 88 (No. 484, Pet. 22–23, 43–44).

As to the first objection, introduction of the envelope is not an absolute prerequisite to proof of mailing, and the testimony of a bank official based on custom and usage and upon special markings on the check itself, are sufficient evidence from which a jury could infer, as the jury here apparently did, that the check was actually transmitted through the mails. *Decker* v. *United States,* 140 F. 2d 378, 379 (C. C. A. 4), certiorari denied, 321 U. S. 792; *United States* v. *Leathers,* 135 F. 2d 507, 510 (C. C. A. 2); *Savage* v. *United States,* 270 Fed. 14, 20–21 (C. C. A. 8), certiorari denied, 257 U. S. 642. The second question raised by petitioners, as to the application of the *Kann* case, at first blush appears to have some merit. The instant case is parallel to the *Kann* case in that, in a sense, Diaz might be said to have had the fruits of his fraud in hand prior to the mailing of the check, and, in addition, the particular

sale to the Fowlers, in connection with which the check was given, had been made prior to this mailing. However, the parallelism ends at this point. This sale to the Fowlers in June 1940 was only one in a series of numerous sales made by various petitioners to them during a period from March 1939 to March 1941 (cf. R. 1192, 1282), and all of these sales were, in turn, only one small part of the scheme in its totality. The scheme charged and proved was a continuing one which was far from complete at the time the particular check was cleared through the mails. And it was necessary to its execution that nothing should arise at any time which would create suspicion on the part of any of the investors; everything had to work smoothly to keep all of the investors lulled into the feeling that they were participating in an honest and fruitful enterprise. It follows, therefore, that it was essential to the scheme to defraud and to the continuing activities of petitioners that the check should clear smoothly and in proper fashion. Under such circumstances, in view of the scope and continuing character of the scheme to defraud, it cannot be said, as in the *Kann* case, where only a single and short lived scheme was involved, that the clearance of the check was brought about after the scheme had reached fruition. On the contrary, as in *Decker* v. *United States, supra,* in which certiorari was denied on March 27, 1944, shortly before the granting of

certiorari in the *Kann* case, 321 U. S. 761, the mailing by the bank here was intimately connected with and essential to the smooth and uninterrupted functioning of the continuing scheme. See also *Corbett* v. *United States,* 89 F. 2d 124, 125–126 (C. C. A. 8).

3. In respect of count 5, petitioners in No. 484 contend that the proof was insufficient both as to their connection with the mailing and as to showing that the mailing was a part of the scheme to defraud (Pet. 49–50). Count 5 was predicated on one of the transactions with Miss Duling, in connection with which she received, at Jackson, Mississippi, a recorded "cash deed" mailed from the clerk's office at Pointe a la Hache, Louisiana, on April 15, 1941. No question is raised as to proof of mailing, since the envelope in which the deed was transmitted was introduced in evidence (Gov. Ex. 74, R. 1861). The claim that some of the petitioners were not shown to have had any connection with this mailing is negated by the proof, outlined in the Statement, *supra,* and analyzed under point 4, *infra,* showing that all of the petitioners were engaged in a single, continuing scheme to defraud. Petitioners, however, urge that the mailing of this deed was no part of the execution of the scheme to defraud, since Miss Duling had already paid money for the tract involved and acquired title prior to this mailing, and they cite the second decision of the Circuit Court of Appeals for the Tenth Circuit in *Mitchell*

v. *United States,* 126 F. 2d 550. The first *Mitchell* decision, 118 F. 2d 653, was based upon an indictment charging mail fraud in connection with a single transaction involving the sale of land. The mailing was predicated, as in the instant case, on the transmittal of a recorded deed to the purchaser. The Tenth Circuit held that the mailing of this recorded deed played no part in the execution of the scheme charged in the indictment, since that scheme did not envisage recording and was complete before the mailing occurred. Thereafter, the Government secured a new indictment charging, as here, a continuing scheme to defraud many victims. On appeal from the second conviction, the Tenth Circuit held that the conviction was good on the basis of the proof adduced and was within the framework of the indictment, since recording was envisaged by the continuing character of the fraud charged and proved. It is apparent, therefore, that the first *Mitchell* decision has no application here and that, as in the second case, the indictment and proof here showed that the mailing of the recorded deed occurred in the course of a continuing scheme to defraud both the particular investor and other investors. Not only were other sales subsequently made to Miss Duling (see Gov. Exs. 75–76, R. 1861–1866), but the sale in question was not complete until she received the "cash deed" mailed on April 15, 1941. Moreover, it is evident that recordation played a vital part in petitioners' scheme (see Statement, *supra,* pp.

13–14) in that it lent an air of authenticity and propriety to the transactions, and thus allayed suspicion while petitioners practiced their scheme to load and reload the particular investor and to ensnare other victims. Cf. *United States* v. *Earnhardt,* 153 F. 2d 472, 473–474 (C. C. A. 7), certiorari denied June 3, 1946, No. 1158, O. T. 1945. Under such circumstances, the recordation was far from an incidental or collateral phase of the scheme, but was an integral part of its execution.

4. Petitioners also contend that while the indictment charged a single scheme to defraud and they were tried and convicted on this theory, the proof in fact showed several separate and independent schemes (No. 484, Pet. 51–52; No. 485, Pet. 8–22; No. 486, Pet. 21–22). Ancillary to this argument are the several contentions that proof of one petitioner's connection with a particular sale or mailing could not be effective against the others (see, e. g., No. 484, Pet. 44–45, 50; No. 485, Pet. 15–16). Petitioners rely upon the recent decision of this Court in *Kotteakos* v. *United States,* decided June 10, 1946, Nos. 457 and 458, O. T. 1945.

It is settled, of course, that in a mail fraud prosecution, the Government need only establish that particular transactions were in furtherance of a common scheme in which various defendants are implicated, not that each defendant participated in each transaction. *United States* v. *Cohen et al.,* 145 F. 2d 82, 90–91, (C. C. A. 2), cer-

tiorari denied, 323 U. S. 799. The only question for discussion, therefore, is whether the proof showed that petitioners were, as charged, implicated in a single scheme to defraud. From the character of the proof summarized in the Statement, *supra,* particularly on pp. 9–13, it is abundantly clear that petitioners can draw no comfort from the *Kotteakos* decision and that one single scheme was established. As the court below stated R. 2408):

> * * * the record leaves in no doubt that they formed one wolf pack. It shows a concerted, plotting, scheming, and conniving in loading and reloading their victims, a concerted scurrying hither and thither to find, a concerted stealthy stalking of their prey. It shows, too, a perfect timing in crowding their victims and in the final moving in for the kill. This could not have been possible had there been no general understanding, no underlying plan.

This concerted plotting and conniving is evident from several different aspects of petitioners' activities. Thus, in almost every case, the so-called "cash deeds" which the various investors received were signed by Baker as president of the Plaquemines Land Company. Most, if not all, of the petitioners at one time or another represented to various investors that they were working for or connected with the Plaquemines Land Company. The record also shows that the combinations of petitioners which operated in

"wolf packs" against various investors shifted at various times, so that at one time or another every petitioner worked with almost every other petitioner in effecting sales. The shifting of personnel and the relations of petitioners to each other is unequivocally shown in the Appendix, *infra,* pp. 46–48. In this setting the *Kotteakos* decision, where the only common denominator between all the defendants was the isolated fact that a single defendant was shown to have had dealings with all the others, is inapposite. As in typical mail fraud, security fraud, and narcotics ring cases, this case is one in which all of the petitioners were shown to have been working in a common scheme under common direction, with a common interest and profit and with mutual relationships and timing of action in which the activities of one were intimately related to the activities of the others. This was no mere thread that bound petitioners together, but rather a mutually binding chain of a common effort under which they were working one for all and all for one. Therefore, there was no error whatsoever in charging, trying, and convicting petitioners on the theory, abundantly proved by the evidence, that they were engaged in a single conspiracy.

5. Petitioners also complain of the proof of mailings on which counts 1 and 2 were predicated (No. 484, Pet. 38–39). Since, as we have shown, petitioners were validly convicted under counts 4 and 5, and since those counts sustain

the concurrent sentences imposed, it is unnecessary to inquire into the validity of the convictions on counts 1 and 2. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105. In any event, petitioners' contentions in respect of these counts are untenable.

Counts 1 and 2 alleged the mailing of certain letters addressed to the Deposit Guaranty Bank, Jackson, Mississippi, on the letterhead of petitioner M. C. Baker, 2110 Audubon Street, New Orleans, Louisiana, and signed in his name as president of the Plaquemines Land Company (R. 19–22; Gov. Ex. 143–144, R. 1992–1994). Each of the two letters stated that there were enclosed the original and two copies of a deed executed by Plaquemines Land Company in favor of Nathan Silverman for acreage (10 and 5 acres, respectively) in Section 30, Township 17 South, Range 17 East. An officer of the addressee bank testified that the letters were received by the bank through the mails, for they bore a stamp of the bank's mail department which was placed only on letters received in the mails (R. 450–456). While the deeds were not introduced in evidence, the bank official identified bank records showing that the enclosures had been received and that, as requested in the letters, credits had been entered in the Hibernia National Bank for the account of the Plaquemines Land Company for the money paid when the deeds were delivered in accordance with the instructions in the letters (R. 450–451; Gov.

Ex. 143a, R. 1992; Gov. Ex. 144a, R. 1994). In addition, the record shows that the parcels of land referred to in the letters were included in a tract under an exploitation lease to Gulf Refining Co. which provided for the division of undivided royalty interests among the owners of parcels in the tract, and that parcels in the same section (30) were sold by Silverman to Miss Duling, of Jackson, Mississippi (see R. 923; Gov. Ex. 75, R. 1861–1863). In view of the testimony of the bank official, there can be no question as to the adequacy of the proof of the receipt of the letters through the mails. And that they were mailed by Baker, acting for Plaquemines Land Co., whose purported signature the letters bore, is evident from the following: (1) the letters referred to land which Plaquemines Land Co. controlled; (2) credits for the payments for the parcels referred to in the letters were, in accordance with instructions in the letters, made and received for the account of Plaquemines Land Co.; and (3) Baker and Silverman were shown by other substantial evidence to have had close relationships in the affairs of the Plaquemines Land Co. Cf. *McNear* v. *United States,* 60 F. 2d 861 (C. C. A. 10). Moreover, since the letters carried a letterhead with a New Orleans address which was shown to be the base of operations for Plaquemines Land Co., there was substantial basis for inferring that the mailing occurred in New Orleans. Cf. *McIntyre* v. *United States,* 49 F. 2d 769 (C. C. A. 6). These

factors collectively were sufficient circumstantial evidence to establish a prima facie case to go to the jury for their determination whether Baker mailed the letters from New Orleans to the bank in Jackson. Cf. *Steiner* v. *United States,* 134 F. 2d 931, 934 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Corbett* v. *United States,* 89 F. 2d 124, 127 (C. C. A. 8); *McNear* v. *United States,* 60 F. 2d 861, 863 (C. C. A. 10); *McIntyre* v. *United States,* 49 F. 2d 769 (C. C. A. 6).

6. Petitioners argue further that there was no proof of the character of the deeds enclosed with the letters involved in counts 1 and 2, since these deeds were not introduced in evidence, and that even if the deeds were presumed to be like the other "cash deeds" in evidence, they were not securities within the meaning of the Securities Act of 1933 (No. 484, Pet. 40–42; No. 486, Pet. 9–12). However, there was an abundance of circumstances from which the jury could properly have inferred that these deeds were typical of the many "cash deeds" in evidence. Briefly, those circumstances were that the parcels referred to in the letters were included in a section and a larger tract controlled by Plaquemines Land Co. and sold to numerous investors by petitioners in small parcels of a comparable size; that the large tract referred to in the letters was under an exploitation lease to Gulf Refining Co., under which royalties were reserved to the title

holders; that in every other of the many instances of sales of parcels of the land in the tracts under lease to Gulf, petitioners employed the "cash deed" device; and that Baker and Silverman were principal figures in the operations of Plaquemines Land Co. It is apparent, therefore, that the jury properly concluded that the deeds referred to in the letters upon which counts 1 and 2 were predicated must have been so-called "cash deeds."

The "cash deeds" utilized by petitioners were, by their language and the circumstances of their use, securities under Section 2 (1) of the Securities Act of 1933 (*supra,* p. 3), both as "fractional undivided interests in oil rights and as "investment contracts." The deeds typically recited that the grantee was given, in addition to the land, less the mineral rights therein, "an undivided Prorata Part of All the Mineral Rights" in the larger described tracts already under a lease providing for payments of royalties to the land owners (see Statement, *supra,* p. 13). By its literal language, therefore, the "cash deed" conveyed to the investor-purchaser not merely particular acreage, but also an undivided share with other investor-purchasers in potential oil royalties. In terms the deed falls squarely within the meaning of a "security" as defined in the Securities Act, which includes, *inter alia,* "fractional undivided interests in oil

and gas right" (see p. 3, *supra*).* And the substance of the transactions with the many investor-purchasers supports the conclusion that petitioners were selling "investment contracts" within the meaning of the definition "security" in the Act. Petitioners impressed investors with the fact that they were selling the land because of its value as oil land and for the profit that the investors might realize from their undivided interests in the royalties that would result from exploitation, or from resale of the acreage by the promoters. Indicative of the intent of the promoters is the fact that they had attempted to persuade the Gulf Refining Company to continue its exploitation leases and that the promoters' objective was to enable them to represent that the lands were under exploitation by Gulf. Moreover, the land conveyed by the "cash deeds," being marsh land unsuitable for residential or cultivation purposes, had little or no value independent of the success of the promised oil exploitation. The investors purchased the land at high prices primarily on the basis of these representations and not because they could or intended to occupy, utilize, or develop the land themselves. Under such circumstances, it is patent that what the investors were offered and what they purchased

* Even where the deeds did not employ this literal language, they did actually convey by other language "fractional undivided interests" in the mineral rights. See, e. g., Gov. Ex. 365, R. 2215–2216.

was not land *per se,* but an interest in a speculative promotion, the essence of which was the exploitation and development by others to the end of a mutual sharing by all investors in an undivided interest in oil royalties. In this connection, the decision of this Court in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.,* 320 U. S. 344, is apposite. In that case, certain promoters offered and sold to distant public investors instruments purporting to be assignments of leasehold interests in portions of a three-thousand acre tract of potential Texas oil and gas land, and they represented to investors that they would earn a profit because of drilling operations which were being carried on on the tract. Even though the instruments of assignment did not, as in the instant case, employ terminology unequivocally bringing them within the definition of securities in the Securities Act, this Court held that the defendants were selling "investment contracts" within that definition and stated that (320 U. S. at 348, 349, 352–353):

> Their proposition was to sell documents which offered the purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise. * * *
>
> * * * * *
>
> It is clear that an economic interest in this well-drilling undertaking was what brought into being the instruments that defendants were selling and gave to the

instruments most of their value and all of their lure. The trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end.

* * * * *

Nor can we agree with the court below that defendants' offerings were beyond the scope of the Act because they offered leases and assignments which under Texas law conveyed interests in real estate. In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be.

See also *Securities and Exchange Commission* v. *Howey,* decided May 27, 1946, No. 843, O. T. 1945; *Mansfield et al.* v. *United States,* 155 F. 2d 952 (C. C. A. 5); *United States* v. *Earnhardt,* 153 F. 2d 472 (C. C. A. 7), certiorari denied June 3, 1946, No. 1158, O. T. 1945.

7. The only remaining issue is the contention of petitioner Johnson that the trial court erred in not granting his motion for a directed verdict predicated on his claim that he had been improperly denied the right to a speedy trial pro-

vided by the Sixth Amendment (No. 486, Pet. 6, 16–21). It is true that almost eighteen months elapsed from the filing of the indictment (September 4, 1942) until commencement of the trial (February 28, 1944). However, it does not follow that this delay abridged the right to a speedy trial, because that right is necessarily relative and must be considered with regard to the practical administration of justice. *Beavers* v. *Haubert,* 198 U. S. 77, 86; see also *McDonald* v. *Hudspeth,* 113 F. 2d 984, 986 (C. C. A. 10), certiorari denied, 311 U. S. 683. Thus considered, there was no substantial infringement of Johnson's rights under the Sixth Amendment. The record shows that Johnson's arraignment was delayed until May 26, 1943, due to his efforts to negotiate a favorable sentence in the event he would plead guilty (R. 190–192, 201–202); that on September 28, 1942, he had been sentenced on another charge in the Southern District of Mississippi to three years' imprisonment in a federal penitentiary and was incarcerated during the interval between the indictment and trial here, but not on account of the instant prosecution (R. 190–192); that due to delay in apprehending one of the defendants (R. 192) and to the crowded calendar of the district court, the case could not be tried at an earlier date (R. 193); and that Johnson did not claim or show that his defense was impeded in any way by the delay or that witnesses on his behalf, if any, were no longer available (R. 192–193).

In the light of such circumstances, the delay in trying Johnson cannot be said to have been excessive or oppressive.

CONCLUSION

The decision below is correct, and the case involves no conflict of decisions. It is respectfully submitted that the petitioners for writs of certiorari should be denied.

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APPENDIX

Tables 1 and 2 below are based on an analysis of the record to show the interrelationships of the various petitioners in the many sales of the Plaquemines Parish land. Table 1 lists the names of the petitioners who dealt with each investor-witness, with supporting record references. Table 2 is a summary analysis of the references in Table 1 to show the actual interrelationships.

TABLE 1

[The order of petitioners' names following that of each investor-witness indicates the time sequence of dealings]

Investor	Salesman	Record Ref.
Langlois	Safir and Diaz	(R. 233–234.)
Allen	Kahn	(R. 331, 334–335.)
	Levy & Kahn	(R. 340–341.)
	Kahn and Baker	(R. 341–342.)
Carter	Silverman & Kiefer	(R. 356–357.)
	Silverman, Baker, Kahn & Kiefer.	(R. 374.)
Dupre	Safir	(R. 396–398.)
	Kahn	(R. 406–407.)
	Kahn & Levy	(R. 407–412.)
	Kahn & Levy	(R. 413–415.)
Kahlert	Levy	(R. 465–469.)
	Levy & Kahn	(R. 482–483.)
Koenig	Safir	(R. 532–534.)
	Burgin	(R. 536–537.)
	Safir	(R. 538.)
Lejeune	Kahn	(R. 553–555.)
	Johnson (alias Hunter)	(R. 557–558.)
	Kahn	(R. 563–564.)
	Diaz	(R. 558, 572.)
	Baker	(R. 567–569.)
	Kahn	(R. 565, 570–571.)
	Diaz	(R. 572.)
	Burgin (alias Bryce)	(R. 559.)
	Levy	(R. 573–574.)
	Safir	(R. 574.)
Bergerie	Safir	(R. 631–634.)
	Diaz	(R. 634–638.)
	Johnson	(R. 639–642.)
	Diaz	(R. 644–646.)

TABLE 1—Continued

Investor	Salesman	Record Ref.
Breisacher	Bird	(R. 682–683.)
	Safir	(R. 685–687.)
	Safir	(R. 689–691.)
	Silverman & Johnson (alias Hunter).	(R. 694–699.)
	Levy & Kahn	(R. 713.)
	Levy & Diaz	(R. 713–716.)
	Diaz & Overgaard	(R. 701–705.)
Clifton	Safir	(R. 787–789.)
	Diaz	(R. 791–792.)
Hershey	Kahn	(R. 805–806.)
	Levy	(R. 808–810.)
Daigre	Kahn & Levy	(R. 815–818.)
	Baker	(R. 819.)
	Levy	(R. 820.)
	Kahn & Levy	(R. 822–824.)
	Burgin (alias "Denny")	(R. 821–822.)
	Kahn & Levy	(R. 825–826.)
	Safir	(R. 828–829.)
Koch	Kahn & Levy	(R. 848–852.)
	Kahn & Levy	(R. 852–853.)
Duling	Silverman	(R. 892–894, 897–899, 937–940.)
	Diaz	(R. 905–906, 912.)
	Silverman	(R. 911, 920–922.)
	Johnson & Overgaard	(R. 921.)
	Safir	(R. 924–925.)
Monjure-Matthews	Safir	(R. 966–968.)
	Overgaard	(R. 968–970.)
	Johnson (alias Hunter)	(R. 967–971.)
	Silverman	(R. 974–977.)
	Johnson	(R. 974–975, 978–979.)
Rowe	Diaz	(R. 997–1001.)
	Diaz	(R. 1002–1004.)
	Diaz, Silverman & Kiefer	(R. 1004–1007.)
Harper	Kahn	(R. 1058–1062.)
	Kahn	(R. 1065–1066.)
	Kahn & Baker	(R. 1066–1069.)
	Overgaard	(R. 1070.)
	Diaz	(R. 1071.)
	Baker	(R. 1072–1073.)
Northrop	Manzella	(R. 1092–1093, 1098–1099.)
	Baker	(R. 1102.)
	Burgin (alias Bryce)	(R. 1097–1098.)
Borges	Kiefer	(R. 1104–1106.)
	Kiefer & Silverman	(R. 1107.)
	Silverman & Diaz	(R. 1109–1110.)
Rasmussen	Safir	(R. 1124–1128.)
	Safir & Kahn	(R. 1132–1133.)
	Levy	(R. 1135–1136.)
	Kahn	(R. 1136–1138.)
	Kahn	(R. 1140.)
Cuccia	Kahn & Manzella	(R. 1159–1161.)
	Levy	(R. 1163–1164.)
	Kahn	(R. 1164–1165.)

TABLE 1—Continued

Investor	Salesman	Record Ref.
Fowler-White	Kiefer & Silverman	(R. 1187–1195).
	Diaz & Overgaard	(R. 1220–1224.)
	Burgin (alias Bryce)	(R. 1234–1239, 1260.)
	Diaz & Baker	(R. 1239–1246, 1254, 1259, 1264–1265.)
	Burgin	(R. 1290).
	Kahn	(R. 1291–1294).
Coleman	Kiefer & Silverman	(R. 1422–1423.)
	Bird	(R. 1424.)
	Kiefer, Silverman & Manzella	(R. 1426–1432.)

TABLE 2

[The figure 1 indicates that the petitioners designated were involved in the same sale or sales; 2 indicates that petitioners dealt with the same investor or investors, though not in connection with the same sales; 3 indicates that petitioners accompanied each other when dealing with particular investors. There is no overlapping in the figures given, however, because, in each instance of contact with an investor, only that figure which most aptly describes the interrelationship between the two or more petitioners involved is used. Nor do the figures reflect the number of instances in which the particular relationship existed, although that factor is partially illustrated in Table 1.]

	Baker	Silverman	Kahn	Levy	Safir	Bird	Johnson	Burgin	Diaz
Baker	xxxxx	3	1, 2, 3	1, 2	2	.....	2	1, 2	1, 2, 3
Silverman	3	xxxxx	3	1	2	1, 2	1, 2, 3	2	1, 2, 3
Kahn	1, 2, 3	1, 2, 3	xxxxx	1, 2, 3	1, 2, 3	2	1, 2	1, 2	1, 2, 3
Levy	1, 2	1	1, 2, 3	xxxxx	2	2	1, 2	1, 2	1, 2
Safir	2	2	1, 2, 3	2	xxxxx	2	2	1, 2	1, 2, 3
Bird	.....	1, 2	2	2	2	xxxxx	2	2	2
Johnson	2	1, 2, 3	1, 2	1	2	2	xxxxx	2	1, 2
Burgin	2	2	1, 2	1, 2	1, 2	2	2	xxxxx	2
Diaz	2, 1	1, 2, 3	1, 2	1, 2, 3	1, 2, 3	2	1, 2	1, 2	xxxxx

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